CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1943

No. 57

JOSEPH E. SNOWDEN, PETITIONER,

vs.

EDWARD J. HUGHES, LOUIE E. LEWIS AND ROBERT E. STRAUS, ET AL., ETC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 3, 1943.

CERTIORARI GRANTED JUNE 7, 1943.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No.

JOSEPH E. SNOWDEN,

Petitioner,

vs.

EDWARD J. HUGHES, LOUIE E. LEWIS AND ROBERT E. STRAUS, ELI M. STRAUS AND JAMES LEVY, AS CO-EXECUTORS OF THE LAST WILL AND TESTAMENT OF HENRY HORNER, DECEASED,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

INDEX.

Index to printed record of proceedings in U. S. District Court i

Clerk's certificate to printed record of proceedings in U. S. District Court 23

Index to proceedings in U. S. Circuit Court of Appeals:

- Placita 25
- Appearance of counsel for appellant 25
- Appearance of counsel for appellees 26
- Appearance of counsel for appellees 27
- Order of Nov. 11, 1942, taking cause under advisement 28
- Opinion by Kerner, J., filed Dec. 24, 1942 29
- Judgment affirming, entered Dec. 24, 1942 34
- Motion for leave to file petition for rehearing instanter 35
- Petition for leave to file petition for rehearing instanter 36
- Order granting leave to file petition for rehearing instanter 37
- Reference to filing of petition for a rehearing 37
- Reference to filing of answer to petition for a rehearing 38
- Order of Jan. 30, 1943, denying petition for a rehearing 38
- Motion to stay issuance of mandate 39
- Order of Feb. 4, 1943, staying issuance of mandate 40
- Clerk's certificate 41

Order extending time within which to file petition for certiorari 42

Order allowing certiorari 42

TRANSCRIPT OF RECORD

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 7975

JOSEPH A. SNOWDEN,

Plaintiff-Appellant,

vs.

EDWARD J. HUGHES, LOUIE E. LEWIS, AND EDWARD K. STRAUS, ELY M. STRAUS, AND [illegible], as Co-Executors of the Last Will and Testament of Henry Hughes, Deceased,

Defendant-Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

TRANSCRIPT OF RECORD FILED APRIL 17, 1926

PRINTED RECORD

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 7986

JOSEPH E. SNOWDEN,

Plaintiff-Appellant,

vs.

EDWARD J. HUGHES, LOUIE E. LEWIS, AND ROBERT E. STRAUS, ELI M. STRAUS, AND JAMES LEVY, AS CO-EXECUTORS OF THE LAST WILL AND TESTAMENT OF HENRY HORNER, DECEASED,

Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.

INDEX

	PAGE
Placita	1
Complaint, filed June 13, 1941	2
Motion of defendant Edward J. Hughes to strike complaint and dismiss suit, filed July 7, 1941	10
Motion of defendants Robert E. Straus, Eli M. Straus and James Levy to strike complaint and dismiss suit, filed July 7, 1941	12
Order dismissing cause as to defendants, Robert E. Straus, Eli M. Straus and James Levy and Edward J. Hughes and motion sustained, entered November 21, 1941	14
Motion of defendant Louie E. Lewis to strike complaint and dismiss suit, filed December 11, 1941	15
Order granting leave to defendant Louie E. Lewis to file his appearance, etc., entered December 11, 1941	17
Notice of appeal, filed February 16, 1942	18
Statement of points, filed April 9, 1942	19
Order extending time for filing record and docketing cause, entered March 20, 1942	20
Designation of record, filed April 9, 1942	21
Clerk's certificate	22

1 Pleas in the District Court of the United States for the Northern District of Illinois, Eastern Division, begun and held at the United States Court Room, in the City of Chicago, in said District and Division, before the Honorable Charles E. Woodward, District Judge of the United States for the Northern District of Illinois on Twenty-first day of November, and Eleventh day of December, in the year of our Lord one thousand nine hundred and Forty-one, being one of the days of the regular November Term of said Court, begun Monday, the Second day of November, and of our Independence the 166th year. Placita

Present:
Honorable Charles E. Woodward, District Judge,
William H. McDonnell, U. S. Marshal,
Hoyt King, Clerk.

Filed June 13, 1941

2 IN THE DISTRICT COURT OF THE UNITED STATES
Northern District of Illinois
Eastern Division

Joseph E. Snowden, *Plaintiff,*
vs.
Edward J. Hughes, Louie E. Lewis and Robert E. Straus, Eli M. Straus and James Levy, as Co-executors of the Last Will and Testament of Henry Horner, Deceased, *Defendants.* } No. 3090

Be It Remembered, that the above-entitled action was commenced by the filing of the following Complaint in the above-entitled cause, in the office of the Clerk of the District Court of the United States for the Northern District of Illinois, Eastern Division, on this the Thirteenth day of June, A. D. 1941.

3 IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division
(Caption—Civil Action No. 3090)

COMPLAINT.

To the Honorable Judges of the District Court of the United States for the Northern District of Illinois, Eastern Division:

Now comes the plaintiff, Joseph E. Snowden, complaining of Edward J. Hughes and Louie E. Lewis, formerly members of the State Primary Canvassing Board of Illinois during the year 1940, Robert E. Straus, Eli M. Straus and James Levy, co-executors of the last will and testament of Henry Horner, deceased, who during his lifetime was a member of the State Primary Canvassing Board of Illinois during the year 1940, and respectfully shows unto this Honorable Court as follows:

1. The jurisdiction of this Court is invoked under Subdivision 1 of Section 41 of Title 28 of the United States Code; this being an action at law which arises under the Constitution and laws of the United States, viz., the Fourteenth Amendment of said Constitution, and sections 41, 43 and subdivision 3 of section 47 of Title 8 of the United States Code, wherein the matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000.00. The jurisdiction of this Court is also invoked under subdivision 12 of section 41 of Title 28 of the United States Code, this being an action brought for the recovery of damages
4. on account of injury to property and the deprivation of a right or privilege of a citizen of the United States and for the recovery of damages done in furtherance of a conspiracy in violation of section 47 of Title 8 of the United States Code. The jurisdiction of this Court is further invoked under subdivision 14 of Section 41 of Title 28 of the United States Code, this being an action at law brought to redress the deprivation under color of law, statute, ordinance, regulation, custom or usage of a State of rights, privileges, and immunities secured by the Constitution of the United States, viz., the Fourteenth Amendment to said Constitution, and of rights secured by laws of the United States, viz., Section 43, Title 8 of the United States Code, this being an action for damages against persons who, under color of a statute, ordinance, regulation, custom, and usage of a State subjected and caused to be subjected a citizen of the United States to the deprivation of rights, privileges and immunities secured by the Constitution of the United States, viz., the Fourteenth Amendment to said Constitution, all of which will more fully appear hereafter.

2. That all parties to this action, both plaintiff and defendants, are citizens of the United States and of the State of Illinois, and resident and domiciled in said State. That Henry Horner, during his lifetime was a citizen of the United States and of the State of Illinois and was a resident and domiciled in said State at the time of his death.

3. That the plaintiff, Joseph E. Snowden, is a native born citizen of Chicago, Cook County, State of Illinois, is more than twenty-one years of age, and has resided in the Third Senatorial District of Illinois for a period of more than twenty years next preceding the filing of this com-

plaint. Plaintiff at all times mentioned herein was and is a duly and legally qualified elector under the Constitution of the United States and of the State of Illinois, and is subject to none of the disqualifications provided for voting or for holding the office of representative in the General Assembly of Illinois under the Constitution and laws of the State of Illinois and of the United States. Plaintiff has been for more than thirty years, and is now, a member of the Republican Party and a believer in its tenets and was at all times hereinafter mentioned legally qualified to be a candidate in the Republican Primaries and to be a nominee of the Republican Party.

4. That all of the times mentioned herein, decedent Henry Horner was the duly elected Governor of the State of Illinois, defendant Edward J. Hughes was the duly elected Secretary of State of said State, defendant Louie E. Lewis was the duly elected Treasurer of said State. By virtue of the authority of sections 420 and 456, chapter 46, Illinois Revised Statutes the said decedent Henry Horner, and said defendants, Edward J. Hughes, and Louie E. Lewis were the State Primary Canvassing Board of said State, ministerial officers, charged with the duty of canvassing the returns of primaries conducted in said State, and issuing a proclamation of result thereof made.

Robert E. Straus, Eli M. Straus and James Levy are the co-executors of the last will and testament of Henry Horner, now deceased, and have qualified and are acting pursuant to said last will and testament.

5. That on the 9th day of April, 1940, a general and State wide primary election was held in the State of Illinois. In the said Third Senatorial District there was a primary election for nomination of candidates upon the Republican ticket for the office of members of General Assembly--more particularly Representatives in said General Assembly—pursuant to section 444, et seq., chapter 46, Illinois Revised Statutes. Prior to the said date plaintiff's name had been duly and properly certified as a candidate for the said office in accordance with sections 449, 450, 451, 452 and 453, chapter 46, Illinois Revised Statutes. That at the said Primary Election two, and only two, candidates for representatives in the General Assembly were to be nominated on the Republican ticket. The number of candidates to be nominated is governed by section 454, chapter 46, Illinois Revised

Statutes. The said Republican Senatorial Committee of the said Third Senatorial District had, prior to the said date and pursuant to said statute, filed with the Board of Election Commissioners, the County Clerk of Cook County, and the Secretary of State of Illinois, its proper resolution which is attached hereto, marked "Exhibit A", and made a part hereof.

6. That the votes cast by the Republican electors in said Senatorial District for the nomination of candidates for Representatives in the General Assembly were duly canvassed in accordance with the provisions of section 456, chapter 46, Illinois Revised Statutes. Thereafter, pursuant to the mandate contained in section 456, Chapter 46, Illinois Revised Statutes, the tabulated statement of canvass of returns showing the votes given to the candidates of the Republican Party in the various election precincts and district of the Third Senatorial District of the State of Illinois, at the said Primary Election were duly authenticated and certified to by the Canvassing Board of Cook County, Illinois and were, on the 23rd day of April, A. D. 1940, forwarded to the Secretary of State. Said tabulated canvass of returns showed that one Charles J. Jenkins and this plaintiff were the two candidates receiving the highest number of votes for nomination for representative in the General Assembly on the Republican ticket. Said tabulated statements of canvass of returns are attached hereto marked "Exhibit B", and made a part hereof.

7. That it is provided by the Constitution of Illinois Article IV, sections 7 and 8 that "Three representatives shall be elected in each senatorial district at the general election in the year of Our Lord 1872, and every two years thereafter." In the Third Senatorial District the Democratic Senatorial Committee for the said District had
7 provided, by proper resolution, in accordance with section 454, chapter 46, Illinois Revised Statutes, that there should be only one candidate nominated at the said Primary Election to be held April 9, 1940 as a candidate for Representative in the General Assembly upon the Democratic ticket. Said resolution was duly passed by said Senatorial Committee and copies of the same were filed with the Board of Election Commissioners, the County Clerk of Cook County, Illinois and the Secretary of State of Illinois. A copy of said resolution is attached hereto, marked "Exhibit C", and made a part hereof.

8. That because of the action duly taken by the Republican and Democratic Senatorial Committee of the Third Senatorial District referred to in paragraphs 5 and 7 hereof the nominations so made by the respective political parties were tantamount to the election of the persons so nominated as Representatives in the General Assembly in and for the Third Senatorial District of Illinois.

9. That after the defendant, Edward J. Hughes, acting as Secretary of State received the tabulated statement of returns from the Canvassing Board for Cook County, and the County Clerk of Cook County, the said defendant compiled, certified and issued for public distribution a certain pamphlet entitled as follows:

OFFICIAL VOTE
OF THE
STATE OF ILLINOIS
Cast At The
PRIMARY ELECTION
Held On
April 9, 1940
(State Seal)
Compiled By
EDWARD J. HUGHES,
Secretary of State
Printed by Authority of
the State of Illinois,

a copy of which is attached hereto marked "Exhibit D", and made a part hereof. On page 60 of the said "Exhibit D" the vote as proclaimed and canvassed for
8 the Third Senatorial District is set out, in part, as follows:

PRIMARY VOTE FOR REPRESENTATIVE
IN THE GENERAL ASSEMBLY
All Parties—April 9, 1940
3rd District—Cook County

Democratic—	
George Garry Noonan	30,009
Joseph F. Tittinger	3,764
George Williams	2,129
Frank J. Zengri	1,352
Francis P. Cahill	1,224½
James Phil Durden	627
Lobengula Mosley	616½

Republican—	
Charles J. Jenkins	12,781½
Joseph E. Snowden	3,375½
Frank S. Cacciatore	1,538½
Cora A. Graham	1,511
William McCuen	793
M. Earl Sardon	482

The same tabulated statement of vote is also published in the last official publication issued by the said defendant as Secretary of State showing the official vote cast at all of the State-wide elections held during the calendar year 1940.

10. Under and by virtue of the mandate set forth in section 456, chapter 46, Illinois Revised Statutes it became and was the duty of the defendants Hughes and Lewis and the testator of defendants, Robert E. Straus, Eli M. Straus and James Levy, to wit, Henry Horner, as the members of the State Primary Canvassing Board to receive the tabulated statements of returns of the votes cast in the primary for the nomination of candidates of the Republican Party for Representative in the General Assembly in the Third Senatorial District and to canvass the said returns so received and to proclaim the result thereof in accordance with the provisions of section 454, chapter 46, Illinois Revised Statutes, which provides that the candidates receiving the highest number of votes shall be declared nominated. That the said Henry Horner,
9 Edward J. Hughes and Louie E. Lewis in their official capacity as the State Primary Canvassing Board did claim to have canvassed the tabulated statements of returns from the Third Senatorial District. On the 29th day of April, A. D., 1940 they issued their Official Proclamation designating only one nominee for each party for the office of Representative in the General Assembly from the Third Senatorial District to wit, George Garry Noonan for the Democratic Party, and Charles J. Jenkins for the Republican Party. A copy of this proclamation is attached hereto marked "Exhibit E", and made a part hereof.

And the said Henry Horner, Edward J. Hughes and Louie E. Lewis in their official capacity as the State Primary Canvassing Board after the issuance of their official Proclamation on the 29th day of April, A. D., 1940, willfully, maliciously and arbitrarily failed and refused to file their proper and correct certificate in the office of the

Secretary of State showing that plaintiff had been and was one of the nominees of the Republican Party for the Office of Representative in the General Assembly from the Third Senatorial District of Illinois.

11. That notwithstanding the clear and plain mandates of section 454 and section 456, chapter 46, Illinois Revised Statutes, the defendants Edward J. Hughes and Louie E. Lewis, and the decedent Henry Horner, acting as the State Primary Canvassing Board of Illinois, entered into an understanding and agreement and combined, conspired and confederated together to willfully, maliciously and arbitrarily refuse to designate plaintiff as one of the nominees of the Republican Party for the office of Representative in the General Assembly from the Third Senatorial District of Illinois and to issue their Official Proclamation designating plaintiff as one of the said nominees and to file their proper and correct certificate in the office of the Secretary of State of Illinois showing that plaintiff was one of the nominees of the Republican Party for the office of Representative in the General Assembly from the Third Senatorial District of Illinois.

That the said action of the said defendants Edward J. Hughes and Louie E. Lewis, and the decedent Henry Horner was an unequal, unjust and oppressive administration of the laws of the State of Illinois, in their capacities as State Officers, and a denial to plaintiff, by the State of Illinois, of the protection of the provisions of the Fourteenth Amendment to the Constitution of the United States which provides "No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States, nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

That the said actions of the said defendants Edward J. Hughes and Louis E. Lewis, and the decedent Henry Horner were in contravention of Section 43, Title 8, United States Code in that the said Edward J. Hughes, Louie E. Lewis and the decedent Henry Horner under color of the laws of Illinois subjected plaintiff to the deprivation of rights, privileges and immunities secured by the Constitution and Laws of the United States, namely the Fourteenth Amendment to the said Constitution of the United

States. And in contravention of sub-section 3 of Section 47, Title 8, United States Code in that the said Edward J. Hughes, Louie E. Lewis and the decedent Henry Horner did conspire for the purpose of depriving plaintiff of the equal protection of the laws and of the equal privileges and immunities under the laws; and the said Edward J. Hughes, Louie E. Lewis, and the decedent Henry Horner or one or more of them, notwithstanding the clear and plain mandates of section 454 and section 456, chapter 46, Illinois Revised Statutes, refused to designate
11 plaintiff as one of the nominees of the Republican Party for the office of Representative in the General Assembly in and for the Third Senatorial District of Illinois and to issue their Official Proclamation designating plaintiff as one of the said nominees and to file their proper and correct certificate in the office of the Secretary of State showing plaintiff was one of the nominees of the Republican Party for the office of Representative in the General Assembly from the Third Senatorial District. Whereby plaintiff was injured in his property and was deprived of having and exercising rights and privileges of a citizen of the United States.

12. That because of the action taken by the Republican and Democratic Senatorial Committees of the Third Senatorial District of Illinois referred to in paragraphs 5 and 7 hereof the nominations so made by the respective political parties were tantamount to the election of the persons so nominated as Representatives in the General Assembly in and for the Third Senatorial District of Illinois.

That by virtue of the acts of the said defendants Edward J. Hughes and Louie E. Lewis, and the decedent Henry Horner, referred to in paragraphs 10 and 11 hereof, purporting to act under the color of the laws of the State of Illinois, plaintiff was deprived on the nomination of the Republican Party for the office of Representative in the General Assembly from the Third Senatorial District of Illinois, which was tantamount to election to said office.

13. That at all times mentioned herein the defendants Edward J. Hughes, Louie E. Lewis and the decedent Henry Horner were acting as officers of the State of Illinos and purported to be acting under color of the laws of said State.

Wherefore the plaintiff shows to this Honorable Court that he has been damaged in the amount of $50,000.00

and prays that a judgment be entered against said defendants and each of them in such amount.

Joseph E. Snowden,
Plaintiff.

(Affidavit of plaintiff and exhibits referred to in complaint not copied.)

Filed July 7, 1941

12 And on, to wit, the 7th day of July, 1941, came the Defendant, Edward J. Hughes by his attorney and filed in the Clerk's office of said Court his certain Motion to Strike Complaint and Dismiss the Suit in words and figures following, to wit:

13 IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division
(Caption—Civil Action No. 3090)

MOTION OF EDWARD J. HUGHES TO STRIKE THE PLAINTIFF'S COMPLAINT AND DISMISS THE SUIT.

The Defendant, Edward J. Hughes, moves the Court to strike the complaint of the plaintiff and dismiss the suit upon the following grounds:

1. The complaint fails to state a claim upon which relief can be granted. In support of said motion the Defendant states the following grounds:

(a) The complaint fails to state a cause of action either under the Constitution or laws of the United States of America or under the common law, statutes, or Constitution of the State of Illinois.

(b) The facts alleged in the complaint fail to show that the plaintiff was deprived of any rights, privileges or immunities accruing to him under the Constitution or laws of the United States of America.

(c) No sufficient facts are alleged in the complaint to state a cause of action under Sub-division 1 of Section 41 of Title 28 of the United States Code, under Sections 41, 43 and Sub-division 3 of Sec-

tion 47 of Title 8 of the United States Code, or any of them.

(d) Said complaint shows upon its face that the matters and things therein alleged are solely and exclusively matters of state law under the laws and Constitution of the State of Illinois.

14 (e) The right to nomination for office created solely by the laws of the State does not involve property within the meaning of the 14th Amendment of the United States Constitution, nor is it within the scope of the Constitution or laws of the United States of America.

(f) The facts alleged in said complaint fail to show any discrimination by the defendants against the plaintiff by reason of race, color or previous condition of servitude, or otherwise, embraced within either the 14th or 15th Amendments of the Constitution of the United States of America.

(g) The complaint fails to show that the plaintiff has availed himself of any of the remedies afforded to him by the Constitution and laws of the State of Illinois, or that no remedies are available to him under the statutes and laws of Illinois.

(h) The alleged cause of action is predicated solely upon the claim of the failure of State officers to perform duties imposed upon them in the administration of State law, and by reason thereof does not entitle the plaintiff to invoke the provisions of the Constitution or laws of the United States of America.

2. It affirmatively appears from the complaint that this Court has no jurisdiction of the subject matter for the reason that no diversity of citizenship is claimed and the complaint does not state a cause of action for the reasons above set forth under the laws or Constitution of the United States of America and, therefore, the cause of action is not one of which this Court, as a District Court of the United States, has original jurisdiction under the Constitution and Laws of the United States of America.

Wherefore, the Defendant prays that the complaint be stricken and the suit dismissed with costs against the plaintiff.

George F. Barrett,
Attorney General of the
State of Illinois,
Attorney for Edward J. Hughes.

Filed July 7, 1941

15 And on, to wit, the 7th day of July, 1941, came the Defendants, Robert E. Straus, et al. by their attorneys and filed in the Clerk's office of said Court their certain Motion to Strike Complaint and Dismiss the Suit in words and figures following, to wit:

16 IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division

* * (Caption—Civil Action No. 3090) * *

MOTION OF ROBERT E. STRAUS, ELI M. STRAUS AND JAMES LEVY, CO-EXECUTORS OF THE LAST WILL AND TESTAMENT OF HENRY HORNER, DECEASED, TO STRIKE THE PLAINTIFF'S COMPLAINT AND DISMISS THE SUIT.

The defendants, Robert E. Straus, Eli M. Straus and James Levy, as Co-Executors of the Last Will and Testament of Henry Horner, deceased, move the Court to strike the complaint of the plaintiff and dismiss the suit upon the following grounds:

1. The complaint fails to state a claim upon which relief can be granted. In support of said motion the defendants state the following grounds:

(a) The complaint fails to state a cause of action either under the Constitution or laws of the United States of America or under the common law statutes or Constitution of the State of Illinois.

(b) The facts alleged in the complaint fail to show that the plaintiff was deprived of any rights, privileges or immunities accruing to him under the Constitution or laws of the United States of America.

(c) No sufficient facts are alleged in the complaint to state a cause of action under Sub-division 1 of Section 41 of Title 28 of the United States Code, under Sections 41, 43 and Sub-division 3 of Section 47 of Title 8 of the United States Code, or any of them.

(d) Said complaint shows upon its face that the matters and things therein alleged are solely and exclusively matters of state law under the laws and Constitution of the State of Illinois.

(e) The right to nomination for office created solely by the laws of the State does not involve property within the meaning of the 14th Amendment of the United States Constitution, nor is it within the scope of the Constitution or laws of the United States of America.

(f) The facts alleged in said complaint fail to show any discrimination by the defendants against the plaintiff by reason of race, color or previous condition of servitude, or otherwise, embraced within either the 14th or 15th Amendments of the Constitution of the United States of America.

(g) The complaint fails to show that the plaintiff has availed himself of any of the remedies afforded to him by the Constitution and laws of the State of Illinois, or that no remedies are available to him under the statutes and laws of Illinois.

(h) The alleged cause of action is predicated solely upon the claim of the failure of State officers to perform duties imposed upon them in the administration of State law, and by reason thereof does not entitle the plaintiff to invoke the provisions of the Constitution or laws of the United States of America.

2. It affirmatively appears from the complaint that this Court has no jurisdiction of the subject matter for the reason that no diversity of citizenship is claimed and the complaint does not state a cause of action for the reasons above set forth under the laws or Constitution of the United States of America and, therefore, the cause of action is not one of which this Court, as a District Court of the United States, has original jurisdiction under the Constitution and Laws of the United States of America.

3. It affirmatively appears from said complaint that the cause of action, if any, which might have existed against Henry Horner during his lifetime, has abated by his death and does not survive against these defendants, either under the laws of the State of Illinois or of the United States of America.

Wherefore, these defendants pray that the complaint be stricken and the suit dismissed with costs against the plaintiff.

Sonnenschein, Berkson, Lautmann, Levinson & Morse,
Attorneys for said Defendants.

Herbert M. Lautmann,
One of the attorneys of record for said defendants.

(Affidavit of Service hereto attached—not copied.)

Entered Nov 21, 1941

23 And afterwards, to wit, on the 21st day of November, A. D. 1941, being one of the days of the regular November term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Charles E. Woodward, District Judge, appears the following entry, to wit:

24 In the District Court of the United States
For the Northern District of Illinois
Eastern Division

Friday, November 21, A. D. 1941.

Present:

Honorable Charles E. Woodward, District Judge.

(Caption—No. 3090)

It Is Ordered by the Court that the motion of defendants, Robert E. Straus, Eli M. Straus and James Levy, Co-executors of the Last Will and Testament of Henry Horner, Deceased, and Edward J. Hughes to dismiss the above entitled cause be sustained.

Ordered that the above entitled cause as to the Defendants Robert E. Straus, Eli M. Straus and James Levy, Co-executors of the Last Will and Testament of Henry Horner, Deceased, and Edward J. Hughes be and the same is hereby dismissed at the costs of plaintiff.

19 And on, to wit, the 11th day of December, 1941, came the Defendant, Louie E. Lewis by his attorneys and filed in the Clerk's office of said Court his certain Motion to Strike Complaint and Dismiss the Suit in words and figures following, to wit: Filed Dec. 11, 1941

20 IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division
* * (Caption--Civil Action No. 3990) * *

MOTION OF LOUIE E. LEWIS TO STRIKE THE PLAINTIFF'S COMPLAINT AND DISMISS THE SUIT.

The Defendant, Louie E. Louis, moves the Court to strike the complaint of the plaintiff and dismiss the suit upon the following grounds:

1. The complaint fails to state a claim upon which relief can be granted. In support of said motion the Defendant states the following grounds:

(a) The complaint fails to state a cause of action either under the Constitution or laws of the United States of America or under the common law, statutes, or Constitution of the State of Illinois.

(b) The facts alleged in the complaint fail to show that the plaintiff was deprived of any rights, privileges or immunities accruing to him under the Constitution or laws of the United States of America.

(c) No sufficient facts are alleged in the complaint to state a cause of action under Sub-division 1 of Section 41 of Title 28 of the United States Code, under Sections 41, 43 and Sub-division 3 of Section 47 of Title 8 of the United States Code, or any of them.

(d) Said complaint shows upon its face that the matters and things therein alleged are solely and exclusively matters of state law under the laws and Constitution of the State of Illinois.

21 (e) The right to nomination for office created solely by the laws of the State does not involve property

within the meaning of the 14th Amendment of the United States Constitution, nor is it within the scope of the Constitution or laws of the United States of America.

(f) The facts alleged in said complaint fail to show any discrimination by the defendants against the plaintiff by reason of race, color or previous condition of servitude, or otherwise, embraced within either the 14th or 15th Amendments of the Constitution of the United States of America.

(g) The complaint fails to show that the plaintiff has availed himself of any of the remedies afforded to him by the Constitution and laws of the State of Illinois, or that no remedies are available to him under the statutes and laws of Illinois.

(h) The alleged cause of action is predicated solely upon the claim of the failure of State officers to perform duties imposed upon them in the administration of State law, and by reason thereof does not entitle the plaintiff to invoke the provisions of the Constitution or laws of the United States of America.

2. It affirmatively appears from the complaint that this Court has no jurisdiction of the subject matter for the reason that no diversity of citizenship is claimed and the complaint does not state a cause of action for the reasons above set forth under the laws or Constitution of the United States of America and, therefore, the cause of action is not one of which this Court, as a District Court of the United States, has original jurisdiction under the Constitution and Laws of the United States of America.

3. This defendant does hereby adopt as his own, in support of his Motion to Strike the Plaintiff's Complaint and dismiss the suit, the brief submitted by the defendant, Edward J. Hughes, in support of his Motion to Strike the Plaintiff's Complaint and dismiss the suit, and does also hereby adopt as his own the reply brief of the Defendant, Edward J. Hughes, to the brief submitted by the Plaintiff herein.

Wherefore, the Defendant prays that the complaint be stricken and the suit dismissed with costs against the Plaintiff.

George F. Barrett,
Attorney General of the State of Illinois,
Attorney for Louie E. Lewis.

25 And afterwards, to wit, on the 11th day of December, A.D. 1941, being one of the days of the regular November term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Charles E. Woodward, District Judge, appears the following entry, to wit: Entered Dec. 11, 1941

26 IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division
* * (Caption—Civil Action No. 3090) * *

ORDER.

On motion of Louie E. Lewis, defendant herein, for leave to file his appearance instanter and for leave to file his motion to strike the plaintiff's complaint and dismiss the suit, instanter, and for leave to adopt as his own the brief submitted by the defendant, Edward J. Hughes, in support of his motion to strike the complaint and dismiss the suit and for leave to adopt as his own the reply brief of Edward J. Hughes to the brief filed by the plaintiff, Joseph E. Snowden, and for an order sustaining the motion of Louie E. Lewis to dismiss the above cause and for an order dismissing the above entitled cause as to the defendant, Louie E. Lewis, notice having been served upon all parties, and the court being fully advised in the premises,

It Is Hereby Ordered that leave be and is hereby given to Louie E. Lewis, defendant herein, to file his appearance instanter.

It Is Further Ordered that leave be and is hereby given to the defendant, Louie E. Lewis, to file instanter his
27 motion to strike the plaintiff's complaint and dismiss the suit.

It Is Further Ordered that leave be and is hereby given to Louie E. Lewis, defendant herein, to adopt as his own in support of his motion to strike the plaintiff's complaint and dismiss the suit, the brief submitted by the defendant, Edward J. Hughes, in support of his motion to strike the complaint and dismiss the suit and to adopt as his own the reply brief of the defendant, Edward J. Hughes, filed in reply to the brief filed by Joseph E. Snowden, plaintiff herein.

It Is Further Ordered that the motion of the defendant, Louie E. Lewis, to dismiss the above cause be and the same is hereby sustained.

It Is Further Ordered that the above entitled cause as to the defendant, Louie E. Lewis, be and the same is hereby dismissed at the cost of the plaintiff.

Enter:
Charles E. Woodward,
Judge.

Dated: Dec. 11, A. D. 1941.

Filed Feb. 16, 1942

28 And on, to wit, the 16th day of February, 1942, came the Plaintiff by his attorneys and filed in the Clerk's office of said Court his certain Notice of Appeal in words and figures following, to wit:

29 IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division
(Caption—Civil Action No. 3090)

NOTICE OF APPEAL.

Notice is hereby given that Joseph E. Snowden, Plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Seventh Circuit from the final order and judgment entered in this action on the 21st day of November, 1941 dismissing the above entitled cause as to the Defendants Robert W. Straus, Eli M. Straus and James Levy, Co-executors of the Last Will and Testament of Henry Horner, deceased, and Edward J. Hughes; and also from the final order and judgment entered in this action on the 11th day of December, 1941 dismissing the above entitled cause as to the Defendant, Louie E. Lewis.

Joseph E. Snowden
Joseph E. Snowden
W. Robert Ming, Jr.
W. Robert Ming, Jr.
Harris B. Gaines
Harris B. Gaines
Attorneys for the Plaintiff, Joseph E. Snowden.

32 And on, to wit, the 9th day of April, 1942, came the Plaintiff-Appellant by his attorneys and filed in the Clerk's office of said Court his certain Statement of Points in words and figures following, to wit: Filed Apr. 9, 1942

33 IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division

(Caption—Civil Action No. 3090)

STATEMENT OF POINTS.

Now comes Joseph E. Snowden, Plaintiff-Appellant in the above entitled cause, and says that he relies upon the following points in the prosecution of his appeal from the final order and judgment entered by the District in the above entitled cause on November 21, 1941; and the final order and judgment entered by the District Court in the above entitled cause on December 11, 1941:

1. The District Court erred in sustaining the Defendants' motion to dismiss for want of jurisdiction; the District erred since this is a cause of action arising under the Constitution and laws of the United States.
2. The District Court erred in sustaining the Defendants' motion to dismiss; the District Court erred in denying that the rights claimed by plaintiff to have been abridged by the action of the defendants was a right guaranteed by the Constitution of the United States.
3. The District Court erred in failing to conclude as a matter of law that the Petition and Complaint of the Plaintiff stated a cause of action arising under the Constitution and Laws of the United States.
4. The District Court erred in failing to find that the Petition and Complaint of Plaintiff stated facts constituting a cause of action over which the District Court has jurisdiction.
5. The District Court erred in entering the final orders and judgments herein.

Wherefore, the Plaintiff-Appellant, Joseph E. Snowden, prays that the said final orders and judgments in this cause

may be reversed, and for such other and further relief as may be just in the premises.

Joseph E. Snowden,
W. Robert Ming, Jr.,
Harris B. Gaines,
Attorneys for the Plaintiff-Appellant.

Entered Mar. 20, 1942

30 And afterwards, to wit, on the 20th day of March A.D. 1942, being one of the days of the regular March term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Charles E. Woodward, District Judge, appears the following entry, to wit:

31 IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division

(Caption—Civil Action No. 3090)

ORDER.

This cause coming on to be heard on the motion and petition of Plaintiff-Appellant that the time for the filing of the record on appeal and docketing this cause of action with the United States Circuit Court of Appeals for the Seventh Circuit, and all parties being present in Court, and the Court being fully advised,

It is Hereby Ordered, Adjudged and Decreed that the motion be granted and that the time for the filing of the record on appeal and docketing this cause of action with the United States Circuit Court of Appeals for the Seventh Circuit be, and it is hereby extended to April 18, 1942 from the 27th day of March, 1942.

Enter: Charles E. Woodward,
Judge of the Said District Court.

March 20, 1942.

34 And on, to wit, the 9th day of April, 1942, came the Plaintiff-Appellant by his attorneys and filed in the Clerk's office of said Court his certain Designation of Portions of Record in words and figures following, to wit:

35 IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois
Eastern Division

Filed Apr. 9, 1942

(Caption—Civil Action No. 3090)

DESIGNATION OF PORTIONS OF RECORD TO BE CONTAINED IN RECORD ON APPEAL.

Appellant, Joseph E. Snowden, designates the following portions of the record on appeal in the above entitled cause of action:

1. Petition and Complaint.
2. Motion of Edward J. Hughes to Strike The Plaintiff's Complaint and the Suit.
3. Motion of Robert E. Straus, Eli M. Straus and James Levy, Co-Executors of the Last Will and Testament of Henry Horner, Deceased, to strike The Plaintiff's Complaint and Dismiss the Suit.
4. Order entered November 21, 1941 by Judge Woodward that the said cause, as to the Defendants, Robert W. Straus, Eli M. Straus and James Levy, Co-executors of the Last Will and Testament of Henry Horner, Deceased, and Edward J. Hughes be dismissed, and motion sustained.
5. Motion of Louie E. Lewis to Strike the Plaintiff's Complaint and Dismiss the Suit.
6. Order entered by Judge Woodward on December 11, 1941 giving Louie E. Lewis leave to file appearance and motion to Strike Plaintiff's Complaint and order sustaining motion to dismiss and order dismissing
7. Plaintiff's Notice of Appeal.
8. Statement of Points.
9. Order entered March 20, 1942, extending time for filing the record on appeal and docketing this action to April 18, 1942.
10. This designation of contents of the record on appeal and proof of service thereof.

Joseph E. Snowden,
W. Robert Mitig, Jr.,
Harris B. Gaines,
Attorneys for the Plaintiff Appellant.

A copy of the following documents is hereby acknowledged this 9th day of April, 1942.

1. The foregoing Designation of Portions of Record to be contained in Record on Appeal.
2. The Statement of Points.

Sonnenschein, Berkson, Lautmann, Levinson & Morse,
George F. Barrett,
Attorney General
Attorneys for Defendants-Appellees.

36 Northern District of Illinois } ss:
Eastern Division }

I, Hoyt King, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made in accordance with Praecipe filed in this Court in the cause entitled Joseph E. Snowden vs. Edward J. Hughes, Louie E. Lewis and Robert E. Straus, Eli M. Straus and James Levy, as Co-Executors of the Last Will and Testament of Henry Horner, Deceased, No. 3090, as the same appear from the original records and files thereof now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office, in the City of Chicago, in said District, this 15th day of April, A. D. 1942.

Hoyt King,
Clerk.

(Seal)

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of the printed record filed in this Court on May 21, 1942, in the following entitled cause:

Cause No. 7986.

Joseph E. Snowden,
Plaintiff-appellant,

vs.

Edward J. Hughes, *et al.*,
Defendants-appellees,

as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 15th day of February, A. D. 1943.

Kenneth J. Carrick,
(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

And afterwards, to-wit: On the twenty-first day of May, 1942, there was filed in the office of the Clerk of this Court, an appearance of counsel for appellees, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Cause No. 7986.

Joseph E. Snowden

vs.

Edward J. Hughes.

The Clerk will enter my appearance as counsel for appellee.

George F. Barrett,
Attorney General of the State of Illinois,
208 S. LaSalle St.,
Chicago, Illinois.

Endorsed: Filed May 21, 1942. Kenneth J. Carrick, Clerk.

And afterwards, to-wit: On the third day of June, 1942, there was filed in the office of the Clerk of this Court, an appearance of counsel for appellees, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Cause No. 7986.

Joseph E. Snowden,

appellant,

vs.

Edward J. Hughes, Louie E. Lewis and Robert E. Straus, Eli M. Straus and James Levy, as co-executors of the Last Will and Testament of Henry Horner, Deceased,

appellees.

The Clerk will enter our appearance as counsel for Robert E. Straus, Eli M. Straus and James Levy, as co-executors of the Last Will and Testament of Henry Horner, Deceased, appellees.

Sonnenschein, Berkson, Lautmann, Levinson & Morse,
77 W. Washington St.,
Chicago.

Herbert M. Lautmann,
77 W. Washington St.,
Chicago.

Isaac E. Ferguson,
77 W. Washington St.,
Chicago.

Frank C. Bernard,
77 W. Washington St.,
Chicago.

Endorsed: Filed June 3, 1942. Kenneth J. Carrick, Clerk.

And afterwards, to-wit: On the eleventh day of November, 1942, the following proceedings were had and entered of record, to-wit:

Wednesday, November 11, 1942.

Court met pursuant to adjournment.

Before:

Hon. William M. Sparks, Circuit Judge.
Hon. J. Earl Major, Circuit Judge.
Hon. Otto Kerner, Circuit Judge.

7986	Joseph E. Snowden, *Plaintiff-Appellant,* *vs.* Edward J. Hughes, *et al.,* *Defendants-Appellees.*	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Now this day come the parties by their counsel, and this cause comes on to be heard on the transcript of the record and the briefs of counsel, and on oral argument by Mr. Joseph E. Snowden and Mr. Heber T. Dotson, counsel for appellant, and by Mr. Wm. Creighton Wines, counsel for appellees Edward J. Hughes and Louie E. Louis, and by Mr. Isaac E. Ferguson, counsel for appellees Robert E. Straus, Eli M. Straus and James Levy, Co-executors of the Last Will and Testament of Henry Horner, Deceased, and the Court takes this matter under advisement.

And afterwards, to-wit: On the twenty-fourth day of December, 1942, there was filed in the office of the Clerk of this Court, the opinion of the Court, which said opinion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 7986. October Term and Session, 1942.

JOSEPH E. SNOWDEN,
Plaintiff-Appellant,
vs.
EDWARD J. HUGHES, LOUIE E. LEWIS, and ROBERT E. STRAUS, ELI M. STRAUS and JAMES LEVY, as co-executors of the last will and testament of Henry Horner, Deceased,
Defendants-Appellees.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

December 24, 1942.

Before SPARKS, MAJOR, and KERNER, *Circuit Judges.*

KERNER, *Circuit Judge.* This is an appeal from a judgment dismissing plaintiff's complaint for lack of jurisdiction. The suit was brought to recover $50,000 damages for an asserted illegal refusal to certify that plaintiff had been nominated as a candidate for representative in the general assembly of Illinois. There is no diverse citizenship and the jurisdiction must depend upon the presence of a federal question. Plaintiff claimed the right to maintain the suit was conferred upon him by § 24, subdivisions 1, 12, and 14 of the Judicial Code, 28 U. S. C. A. § 41(1), (12), (14).

The complaint alleged plaintiff was one of several candidates at the April 9, 1940, Republican primary election held in the third senatorial district of Illinois, for the purpose of electing nominees for the office of representative in the general assembly of Illinois; that there were to be two nominees elected; that under the laws of Illinois,

the two candidates receiving the highest number of votes were to be declared the nominees; that at the said primary election, the returns were made to the county clerk of Cook County, duly authenticated and certified by the canvassing board of Cook County, Illinois, and forwarded to the secretary of state of Illinois, showing that plaintiff and one Jenkins were the two candidates receiving the highest number of votes for nomination for representative in the general assembly on the Republican ticket; that the tabulated statement of returns made to the secretary of state by the county canvassing board of Cook County was to be canvassed by the state primary canvassing board, proclamation of the result thereof made, and certificates of nomination issued to candidates appearing to have received the highest number of votes; that the official vote of the primary election, as duly published by the secretary of state of Illinois, showed plaintiff as being one of the two candidates receiving the highest number of votes cast; that the governor, secretary of state, and state treasurer—members of the state primary canvassing board—are charged with the duty of canvassing the tabulated statement of returns, proclaiming the results, and issuing the certificate of nomination; that the defendants, while acting as the duly designated officers of the state primary canvassing board, issued their official proclamation designating only one nominee for the office of representative in the general assembly and illegally failed and refused to certify that plaintiff had been duly nominated as a candidate.

The complaint charged that the unlawful acts on the part of the defendants were done in furtherance of a conspiracy between the defendants and were an unequal administration of the laws of Illinois—a denial to plaintiff, by the State of Illinois, of the protection of the Fourteenth Amendment to the Constitution of the United States, and deprived plaintiff of the rights, privileges, and immunities secured by the Constitution of the United States and the laws of the United States.

Plaintiff claims that the defendants as ministerial officers failed and refused to comply with the law, and in so doing, prevented plaintiff from enjoying the equal protection of the laws of Illinois and of the United States, and have been guilty of conduct which deprived him of rights guaranteed to him by the Fourteenth Amendment to the Constitution of the United States; and that he, therefore,

has a cause of action under the Civil Rights Act of April 20, 1871, now § 1979, Revised Statutes, 8 U. S. C. A. § 43, which provides: "Every person who, under color of any statute * * * of any State * * * subjects * * * any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law * * *."

It is well settled that privileges and immunities of citizens of the United States are only such as arise out of the nature and essential character of the national government, or are specifically granted or secured to all citizens or persons by the Constitution of the United States, *Twining* v. *New Jersey*, 211 U. S. 78, 97.

The argument is made that the privileges and immunities of the citizens of the United States include the right to an equal opportunity of being elected to serve in the legislative councils of the state, and in support of this contention plaintiff cites the cases noted below.[1]

This case is very different from the cases cited. In the *Swafford* and *Wiley* cases, the right of the plaintiff alleged to have been infringed was the right to vote in an election for a member of the national house of representatives. It was held that a federal question was involved, because the right to vote for a member of Congress was dependent upon the Constitution and the laws of the United States.

In the *Lane* case, a Negro citizen complains of a denial of the right to vote, in direct violation of the Fifteenth Amendment; and in the *Hague* case, federal jurisdiction was bottomed on plaintiff's claim that certain ordinances relating to public meetings, deprived the plaintiff of the right to peaceful assembly and free speech secured by the Fourteenth Amendment; while the *Kline* case was based on diversity of citizenship, with no claim that the matter in controversy arose under the Constitution and the laws of the United States.

Section 454 of the Elections Act, c. 46 Ill. Rev. St. 1941, provides that the candidates receiving the highest number of votes shall be declared nominated, and § 456 of the Act provides: "Tabulated statements of the returns of the primary for the nomination of candidates * * * shall

1. *Swafford* v. *Templeton*, 185 U. S. 487; *Wiley* v. *Sinkler*, 179 U. S. 58; *Hague* v. *C. I. O.*, 307 U. S. 496; *Lane* v. *Wilson*, 307 U. S. 268; and *Kline* v. *Burke Construction Co.*, 260 U. S. 226.

be made to the Secretary of State, canvassed by the State Primary Canvassing board, proclamation of the result thereof made, and certificates of nomination issued, * * * and the election of any person nominated * * * may be contested by filing with the clerk of the circuit court a petition in writing * * *."

In our case, the plaintiff does not contend that the Elections Act of Illinois, governing primary elections, is in any respect repugnant to the Constitution of the United States; on the contrary, he admits that the statute under which the defendants derived their authority as members of the state primary canvassing board is fair, but he claims the actual administration of the law fell far short of the level required by the Fourteenth Amendment, and he insists that the defendants, in refusing to issue to him a certificate of nomination, denied him the equal protection of the laws.

It has always been accepted that the Fourteenth Amendment does not apply to the acts of individuals, *Virginia* v. *Rives*, 100 U. S. 313; *United States* v. *Harris*, 106 U. S. 629; that the protection it offers is only against the acts of states. Established as this limitation is, the problem of determining what action is state action within the meaning of the amendment is not always easy. To be sure, in every case the initial question is whether the action was by a state instrumentality, but the controlling question is whether sufficient state sanction was given to such action to make it the action of the state for the purposes of the Fourteenth Amendment, since "Many acts done by an agency of a State may be illegal in their character, when tested by the laws of the State, and may, on that ground, be assailed, and yet they cannot, for that reason alone, be impeached as being inconsistent with the due process of law enjoined upon the States. The Fourteenth Amendment was not intended to bring within Federal control everything done by the States or by its instrumentalities that is simply illegal under the state laws, but only such acts by the States or their instrumentalities as are violative of rights secured by the Constitution of the United States." *Owensboro Co.* v. *Owensboro*, 200 U. S. 38, 47.

In *Barney* v. *City of New York*, 193 U. S. 430, the court held that where the act complained of was forbidden by the state legislature, it could not be said that the act was that of the state for the purposes of the Fourteenth Amendment, and the court denied the jurisdiction of the District Court

to entertain the cause. This decision controls the instant case, for it appears on the face of the plaintiff's complaint that the defendants' acts were forbidden by the Illinois statute and that these illegal acts were the gravamen of the plaintiff's complaint.

We recognize that there is some question as to the current value of the *Barney* case as authority. In the light of subsequent Supreme Court cases,[2] there can be no doubt that the broad language used in the *Barney* opinion is no longer accurate. For example, since *Raymond* v. *Chicago Traction Co.*, 207 U. S. 20, the Supreme Court has authorized the federal courts to take jurisdiction on the ground that the decision of a state administrative tribunal was contrary to the Fourteenth Amendment. Nor need the federal courts refrain from exercising jurisdiction under the amendment until the highest court of a state has determined whether the complained of enforcement of the state statute has violated the constitutional provision of the state which chanced to be similar to the Fourteenth Amendment. *Home Tel. & Tel. Co.* v. *Los Angeles*, *supra*. These cases and others in which the *Barney* case is discussed, evidence the trend of the court to subject to the federal courts' scrutiny the actions of the states before such actions have been sanctioned by the highest authority of the state, but the narrow holding of the *Barney* case still stands as a matter of law and as a matter of sound federal jurisprudence. We conclude that when the act complained of is plainly and clearly in violation of a state law, as in our case, it is not an act of the state for the purposes of the Fourteenth Amendment.

The judgment is

AFFIRMED.

Endorsed: Filed Dec. 24, 1942. Kenneth J. Carrick, Clerk.

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2. The Barney case was modified in *Home Tel. & Tel. Co.* v. *Los Angeles*, 227 U. S. 278.

And on the same day; to-wit: On the twenty-fourth day of December, 1942, the following further proceedings were had and entered of record, to-wit:

Thursday; December 24, 1942.

Court met pursuant to adjournment.

Before:

Hon. William M. Sparks, Circuit Judge,
Hon. J. Earl Major, Circuit Judge,
Hon. Otto Kerner, Circuit Judge.

Joseph E. Snowden,
Plaintiff-Appellant,
7986 *vs.*
Edward J. Hughes, *et al.*,
Defendants-Appellees.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, affirmed, with costs.

And afterwards, to-wit: On the thirteenth day of January, 1943, there was filed in the office of the Clerk of this Court, a motion for leave to file petition for a rehearing instanter, which said motion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 7986.

Joseph E. Snowden,
Plaintiff-Appellant,
vs.
Edward J. Hughes, Lonie E. Lewis and Robert E. Straus, Eli M. Straus and James Levy, as Co-Executors of the Last Will and Testament of Henry Horner, Deceased,
Defendants-Appellees.

MOTION.

Now comes Joseph E. Snowden, Plaintiff Appellant, by his attorneys, Joseph E. Snowden, W. Robert Ming, Jr., and Heber T. Dotson, and respectfully moves this Honorable Court for the entry of an order giving leave to this Plaintiff-Appellant to file, Instanter, his printed Petition for a re-hearing in the above entitled cause.

Joseph E. Snowden,
W. Ming, Jr.,
Heber T. Dotson,
Attorneys for Plaintiff-Appellant, Joseph E. Snowden.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit

No. 7986.

Joseph E. Snowden,
Plaintiff-Appellant,
vs.
Edward J. Hughes, Louie E. Lewis and Robert E. Straus, Eli M. Straus and James Levy, as Co-Executors of the Last Will and Testament of Henry Horner, Deceased,
Defendants-Appellees.

PETITION OF APPELLANT, JOSEPH E. SNOWDEN, FOR LEAVE TO FILE, INSTANTER, HIS PRINTED PETITION FOR A RE-HEARING IN THE ABOVE ENTITLED CAUSE.

Your Petitioner, Joseph E. Snowden, respectfully shows that he is the Plaintiff-Appellant in the above entitled matter and that he has personal knowledge of the facts herein set forth.

That he received a copy of the opinion of the Court in the above matter on the 26th day of December, 1942, due to a delay in the delivery of the mail.

Your Petitioner further shows that in ascertaining the time in which he was to file his petition for a re-hearing he read a copy of the Rules of this Court which was not down to date and was of the opinion that he, the petitioner, had twenty days in which to file his petition for a re-hearing in the above matter under the Rules of this Court.

Your Petitioner respectfully shows unto the Court that substantial justice will be done by the Court if this Petitioner is permitted to file, Instanter, his printed Petition for a rehearing in the above entitled matter.

Your Petitioner therefore respectfully asks that an order be entered by this Court allowing this Appellant leave to file, Instanter, his printed Petition for a re-hearing in the above matter.

Joseph E. Snowden.

State of Illinois }
County of Cook } ss.

Joseph E. Snowden, being first duly sworn states that he is the petitioner in the above petition, that he has read the same and says that the same is true in substance and in fact.

Joseph E. Snowden.

Subscribed and sworn to before me this 12th day of January, 1943.

Benjamin W. Clayton,
(Seal) *Notary Public.*

Endorsed: Filed Jan. 13, 1943. Kenneth J. Carrick, Clerk.

And afterwards, to-wit: On the fourteenth day of January, 1943, the following further proceedings were had and entered of record, to-wit:

Thursday, January 14, 1943.

Court met pursuant to adjournment.

Before:

Hon. Otto Kerner, Circuit Judge.

7986 Joseph E. Snowden, *Plaintiff-Appellant*, vs. Edward J. Hughes, *et al.*, *Defendants-Appellees.* } Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

On motion of counsel for appellant, it is ordered that appellant may file a petition for a rehearing of this cause instanter.

And on the same day, to-wit: On the fourteenth day of January, 1943, there was filed in the office of the Clerk of this Court, a petition for a rehearing which said petition for a rehearing is not copied here.

And afterwards, to-wit: On the twenty-first day of January, 1943, there was filed in the office of the Clerk of this Court, an answer to petition for a rehearing which said answer to petition for a rehearing is not copied here.

And afterwards, to-wit: On the thirtieth day of January, 1943, the following further proceedings were had and entered of record, to-wit:

Saturday, January 30, 1943.

Court met pursuant to adjournment.

Before:

Hon. William M. Sparks, Circuit Judge,
Hon. J. Earl Major, Circuit Judge,
Hon. Otto Kerner, Circuit Judge.

7986	Joseph E. Snowden, *Plaintiff-Appellant,* *vs.* Edward J. Hughes, *et al.*, *Defendants-Appellees.*	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

It is ordered by the Court that the petition for a rehearing of this cause be, and it is hereby, denied.

And afterwards, to-wit: On the fourth day of February, 1943, there was filed in the office of the Clerk of this Court, a motion to stay mandate, which said motion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 7986.

Joseph E. Snowden,
Plaintiff-Appellant,
vs.
Edward J. Hughes, Louie E. Lewis and Robert E. Straus, Eli M. Straus and James Levy, as Co-Executors of the Last Will and Testament of Henry Horner, Deceased,
Defendants-Appellees.

MOTION.

Now Comes Joseph E. Snowden, Plaintiff, Appellant, by his attorneys, Joseph E. Snowden, W. Robert Ming, Jr., and Heber T. Dotson, and respectfully moves this Honorable Court in accordance with paragraph (2) of rule (25) of the Rules of the United States Circuit Court of Appeals, For the Seventh Circuit, that a stay of Mandate for a period of (30) days be granted in the above entitled cause, pending application for Certiorari to the Supreme Court of the United States.

Joseph E. Snowden,
W. Robert Ming, Jr.,
Heber T. Dotson,
Attorneys for Plaintiff-Appellant,
Joseph E. Snowden.

Endorsed: Filed Feb. 4, 1943. Kenneth J. Carrick, Clerk.

And on the same day, to-wit: On the fourth day of February, 1943, the following further proceedings were had and entered of record, to-wit:

Thursday, February 4, 1943.

Court met pursuant to adjournment.

Before:

Hon. Otto Kerner, Circuit Judge.

7986	Joseph E. Snowden, *Plaintiff-Appellant*, *vs.* Edward J. Hughes, *et al.*, *Defendants-Appellees.*	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

On motion of counsel for appellant, it is ordered that the issuance of the mandate of this Court in this cause be, and it is hereby, stayed pursuant to Rule 25 of the Rules of this Court.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of the proceedings had and papers filed (excepting briefs of counsel, stipulations relative to time for filing briefs and election of counsel to print record) in the following entitled cause:

Cause No. 7986.

Joseph E. Snowden,
Plaintiff-Appellant,

vs.

Edward J. Hughes, *et al.*,
Defendants-Appellees,

as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 15th day of February, A. D. 1943.

Kenneth J. Carrick.
(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

[fol. 42] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1942

No. —

JOSEPH E. SNOWDEN, Petitioner,

vs.

EDWARD J. HUGHES, LOUIE E. LEWIS and ROBERT E. STRAUS, Eli M. Straus and James Levy, as Co-executors of the Last Will and Testament of Henry Horner, Deceased

ORDER EXTENDING TIME WITHIN WHICH TO FILE PETITION FOR CERTIORARI

Upon Consideration of the application of counsel for the petitioner.

It Is Ordered that the time for filing petition for certiorari in the above-entitled cause be, and the same is hereby, extended to and including May 6th, 1943.

Hugo L. Black, Associate Justice of the Supreme Court of the United States.

Dated this 30th day of April, 1943.

[fol. 43] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed June 7, 1943

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILED
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

IN THE OCTOBER TERM, 1942

No. 991

JOSEPH E. SNOWDEN,

Petitioner,

vs.

EDWARD J. HUGHES, LOUIE E. LEWIS AND ROBERT E. STRAUS, ELI M. STRAUS AND JAMES LEVY, AS CO-EXECUTORS OF THE LAST WILL AND TESTAMENT OF HENRY HORNER, DECEASED,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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INDEX.

	PAGE
Petition	1-7
Summary of Statement of Matter Involved	2-6
A. The Proceedings	2-3
B. Statement of Facts	3-6
Questions Presented	6
Reasons Relied on for Allowance of the Writ	7
Brief in Support of the Petition	8
Statement of the Case	8-9
Grounds on Which Jurisdiction of this Court is Invoked	9
Specifications of Errors	10

SUMMARY OF THE ARGUMENT.

I. The Decision of the Circuit Court of Appeals is in Conflict with the Applicable Decisions of this Court	12-30
A. Misuse of power possessed by virtue of state law is state action within the meaning of the Fourteenth Amendment if that misuse is in excess of authority	12-18
B. Petitioner was deprived of the equal protection of the laws of the State of Illinois by respondents exercising state authority in violation of the Fourteenth Amendment	18-25
1. The "Equal Protection" clause applies to executive and administrative action	22-24
2. Respondents' action was state action within the meaning of the Fourteenth Amendment	24-25

PAGE

SUMMARY OF THE ARGUMENT (Continued).

C. Respondent deprived petitioner of a fundamental liberty without due process in violation of the Fourteenth Amendment 25-30

1. Arbitrary and malicious action cannot constitute "Due Process" 27-30

II. This Case Presents Important Questions of Federal Law Which Should Be Settled by this Court 30

A. Whether the misuse of power possessed by virtue of state law is state action within the meaning of the Fourteenth Amendment, even if that misuse is in excess of authority, is important to the enforcement of the Fourteenth Amendment 30-31

B. The extent of the protection affording the right of every citizen to be a candidate for public office by the Constitution of the United States is a fundamental question unsettled by this Court 31-32

Argument 12-32

CASES CITED.

Allegeyer v. Louisiana, 165 U. S. 578, 589 (1897) 26

Alston v. School Board of the City of Norfolk, 112 F. (2d) 992, cert. den. 331 U. S. 693 (1940) 22-24

Barbier v. Connolly, 113 U. S. 27, 32 (1885) 20

Barney v. New York, 193 U. S. 430, 437 (1904) ..... 7, 12, 13 note, 14, 16, 30

Butler v. Perry, 240 U. S. 328 (1916) 26

Coppage v. Kansas, 236 U. S. 1 (1915) 26

Crandall v. Nevada, 73 U. S. 35, 44 (1867) 25

Cummings v. Missouri, 71 U. S. (4 Wall.) 277, 321 (1866) 31

CASES CITED (Continued). PAGE

Des Moines v. Des Moines City Railway, 214 U. S. 179 (1909) 14

Ex Parte Young, 209 U. S. 123; 52 L. Ed. 714 (1908) 24

Fletcher v. Tuttle, 151 Ill. 41, 53; 37 N. E. 683, 686 (1894) 25

Gillespie v. People, 188 Ill. 176, 182, 183; 58 N. E. 1007, 1009 (1900) 29

Hayes v. Missouri, 120 U. S. 68 (1886) 20

Home Telephone and Telegraph Co. v. Los Angeles, 227 U. S. 278, 287, 294 (1913) 15, 16, 17, 24

Hurtado v. California, 110 U. S. 516, 525 (1884) 19, 28

Iowa-Des Moines National Bank v. Bennett, 284 U. S. 239, 246 (1931) 16, 17

Josma v. Western, 249 Ill. 508, 514; 94 N. E. 945, 946 (1911) 29

Mills v. Board of Education of Ann Arundel County, 30 F. Supp. 245 (1939) 22, 24

Mills v. Lowndes, 26 F. Supp. 792 (1939) 22

Minersville School District v. Gobitis, 310 U. S. 586 (1940) 26

Missouri ex. rel. Gaines v. Canada, 305 U. S. 337 (1938) 21, 22

Owensboro Co. v. Owensboro, 200 U. S. 38, 47 (1906) 12 note

People ex rel. Breckon v. Board of Election Commissioners, 211 Ill. 9, 77 N. E. 321 (1906) 25

People v. Hurlbut, 24 Mich. 44, 107; Am. Rep. 103, 114, 115 (1871) 26, 31, 32

People v. Niesman, 356 Ill. 322, 326, 190 N. E. 668 (1934) 29

Raymond v. Chicago Traction Co., 207 U. S. 20, 37 (1907) 12, 13, 14

PAGE

CASES CITED (Continued).

Siler v. Louisiana and Nashville R. R., 213 U. S. 175, 192 (1909) 14

South Chicago City Railway Co. v. Baird, 114 Fed. 557 (C.C.N.D. Ill., 1902) ..... 13 note

Standard Scale Co. v. Farrell, 249 U. S. 571, 577 (1919) 24

State v. Julow, 129 Mo. 163, 172, 173 (1895) 29

Sunday Lake Iron Co. v. Township of Wakefield, 247 U. S. 350, 352 (1918) 20

Truax v. Corrigan, 257 U. S. 312, 331-333 (1921) 19, 22, 29

Truax v. Raich, 239 U. S. 33 (1915) 26

U. of Md. v. Murray, 169 Md.; 182 Atl. (Md.) 590 (1935) 21, 24

United States v. Classic, 313 U. S. 299, 326 (1941) 17, 25

West v. Bliley, et al., 33 F. (2d) 177 (1929); affirmed 42 F. (2d) 101 (C.C.A. 4th Cir. (1930)) 25

Wolff Packing Co. v. Court of Industrial Relations, 262 U. S. 522 (1923) 26

Yick Wo v. Hopkins, 118 U. S. 356, 373-374 (1886) 23, 29

CONSTITUTION, STATUTES CITED.

Ill. Cont., Art IV, Secs. 7 and 8 4

Ill. Rev. Stat., chap. 46, pars. 420 and 456 4

Ill. Rev. Stat., chap. 46, 444 *et seq.* 4

Ill. Rev. Stat., chap. 46, pars. 449-453 4

Ill. Rev. Stat., chap. 46, pars. 454-456 ..... 4, 24, 30

U. S. Const., Art. XIV, par. 1 ..... 10, 11, 14, 15, 16, 21, 24, 25, 27, 31

8 U. S. C., pars. 41, 43 and 47 (3) 2, 9, 17

18 U. S. C., pars 51, 52, pars. 19, 20 Crim. Code 17

28 U. S. C., par. 41, (1) (12) and (14) 2

28 U. S. C. par. 347 (a) 1

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Now comes your Petitioner, Joseph E. Snowden, Complainant below, and prays this Court to issue its writ of certiorari to review the decision of the United States Circuit Court of Appeals for the Seventh Circuit in *Snowden* v. *Hughes, et al.*, No. 7986 in that court. The basis of this Court's jurisdiction to review that decision is § 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, (28 U. S. C. § 347(a)).

I. SUMMARY STATEMENT OF MATTER INVOLVED.

A. The Proceedings.

On June 13, 1941, Petitioner filed a complaint in the District Court of the United States for the Northern District of Illinois, Eastern Division, seeking to recover damages in the amount of $50,000 from the Respondents (Tr. 2). The jurisdiction of the district court was invoked under 28 U. S. C. § 41(1) (12) and (14), this being an action at law under the Constitution and laws of the United States, particularly the Fourteenth Amendment to the Constitution and 8 U. S. C. §§ 41, 43, and 47(3) (Tr. 3). The complaint alleged that the Respondents, Edward J. Hughes, and Louie E. Lewis, and the decedent, Henry Horner, whose co-executors are Respondents, were respectively the duly elected Secretary of State, Treasurer, and Governor of the State of Illinois, and were, *ex officio*, members of the State Primary Canvassing Board of that State (Tr. 4). The complaint charged that these state officers acting under the color of the laws of the State of Illinois had wilfully, maliciously and arbitrarily acted in connection with the general primary of April 9, 1940, so as to deprive Petitioner of the nomination of the Republican Party for the office of Representative in the General Assembly from the Third Senatorial District of Illinois, which was tantamount to election to said office, in violation of the Fourteenth Amendment (Tr. 8-9). Each of the Respondents moved to strike the complaint and to dismiss the suit (Tr. 10-14, 15-16), and the motion to dismiss the cause was sustained by the Honorable Charles E. Woodward, District Judge, on November 21, 1941, without opinion or conclusions of law (Tr. 14, 17-18). Notice of appeal to the United States Circuit Court of Appeals

for the Seventh Circuit was filed by Petitioner on February 16, 1942 (Tr. 18). On December 24, 1942, that court affirmed the judgment of the district court on the ground that the acts complained of "were forbidden by the Illinois statute" and that when "the act complained of is plainly and clearly in violation of a state law, as in our case, it is not an act of the state for the purposes of the Fourteenth Amendment" (Tr. 29-34, 132 F. (2d) 476). A petition for rehearing was filed on leave granted by that court on January 14, 1943 (Tr. 36-37), and on January 30, 1943, that petition for rehearing was denied without opinion (Tr. 38).

B. Statement of Facts.

This case having been decided below on the complaint and Respondents' motion to dismiss, the allegations of the complaint stand admitted.

All of the parties to this action, are citizens of the United States, and of the State of Illinois, and resident and domiciled in said State, as was the decedent, Henry Horner, at the time of his death (Tr. 3). Petitioner is a native-born citizen of Chicago, Cook County, State of Illinois, is more than 21 years of age and has resided in the Third Senatorial District of Illinois for more than 20 years last past (Tr. 3). At all of the times mentioned herein Petitioner was, and is, a duly and legally qualified elector under the Constitution and laws of the United States and of the State of Illinois, and is subject to none of the disqualifications provided for voting, or for holding the office of Representative in the General Assembly of Illinois under the Constitution and laws of that State and of the United States (Tr. 4).

For more than 30 years Petitioner has been, and is now, a member of the Republican Party and a believer in its tenets, and at all of the times material herein Petitioner

was legally qualified to be a candidate in a Republican primary and to be a nominee of the Republican Party (Tr. 4). At all of the times material herein, the decedent, Henry Horner, was the duly elected Governor of the State of Illinois, Respondent Edward J. Hughes was the duly elected Secretary of State of that state, and Respondent Louie E. Lewis was the duly elected Treasurer of that state (Tr. 4). Under §§ 420 and 456, chapter 46, Illinois Revised Statutes, these officers were constituted the "State Primary Canvassing Board," and were charged with the duty of canvassing the returns of primaries conducted in that state and with the obligation to issue a proclamation as to the result thereof (Tr. 4).

On April 9, 1940, a general state-wide primary election was held in the State of Illinois (Tr. 4). In the Third Senatorial District of that state the primary included a nomination of candidates of both the Republican and Democratic parties for the office of Representative in the General Assembly pursuant to §§ 444 *et seq.*, chapter 46, Illinois Revised Statutes (Tr. 4, 6). Prior to that date Petitioner's name had been duly and properly certified as a candidate for the Republican nomination for that office in accordance with §§ 449-453, chapter 46, Illinois Revised Statutes (Tr. 4). At that primary election, two, and only two, candidates for the office of Representative in the General Assembly were to be nominated by the Republican Party (Tr. 4). Although it is provided by §§ 7 and 8 of Article IV of the Constitution of the State of Illinois that "three representatives shall be elected in each Senatorial District at the general election in the year of Our Lord 1872, and every two years thereafter" (Tr. 5), the number of candidates to be nominated is governed by § 454, chapter 46, Illinois Revised Statutes (Tr. 4). Under that section the Republican Senatorial Committee of the Third Senatorial District had filed with the Board of Election Commissioners, the County Clerk of Cook County, and the Secre-

tary of State of Illinois, a proper resolution so limiting the number of Republican candidates to be nominated, and the Democratic Senatorial Committee of that district had similarly resolved that only one Democratic candidate should be nominated at that primary election (Tr. 5). In view of this action by the Republican and Democratic Senatorial Committees of that district, nomination by either of these parties was tantamount to election (Tr. 6).

Upon the closing of the polls on April 9, 1940, the votes cast by the Republican electors in the Third Senatorial District for the nomination of candidates for Representative in the General Assembly were duly canvassed by the Canvassing Board of Cook County, Illinois, and a tabulated statement of the canvass of returns showing the votes given to each of the candidates for the Republican nomination for that office in the Third Senatorial District were forwarded to the Secretary of State (Tr. 5). That canvass showed that one Charles J. Jenkins and this Petitioner were the two candidates receiving the highest number of votes for the Republican nominations (Tr. 5).

Thereafter the Respondent, Edward J. Hughes, acting as Secretary of State, received that tabulated statement of returns and compiled, certified, and issued for public distribution under the seal of the state, a certain pamphlet entitled "Official Vote of the State of Illinois Cast at the Primary Election held on April 9, 1940," showing that the said Charles J. Jenkins and Petitioner were the two candidates for the Republican nominations for Representative in the General Assembly receiving the highest number of votes in the Senatorial District (Tr. 6-7).

Under the state law it then became the duty of the Respondents, Hughes and Lewis, and the decedent, Henry Horner, acting as the State Primary Canvassing Board, to receive the tabulated statements of returns of the votes cast in the primary and to canvass those returns and to

proclaim the result thereof (Tr. 7). The board received the returns but on April 20, 1940, issued an official proclamation designating only Charles J. Jenkins as a Republican nominee for the office of Representative in the General Assembly from the Third Senatorial District (Tr. 7).

Acting in their official capacity as the State Primary Canvassing Board the Respondents, Hughes and Lewis, and the decedent, wilfully, maliciously, and arbitrarily failed and refused to file a proper and correct certificate in the office of the Secretary of State showing that Petitioner had been nominated by the Republican Party for the office of Representative in the General Assembly for the Third Senatorial District (Tr. 7-8). This unequal, unjust and oppressive administration of the laws of the State of Illinois was carried out pursuant to an agreement and combination made by these state officers (Tr. 8), and they acted under the color of the laws of that state in subjecting Petitioner to a deprivation and denial of rights and privileges secured to him by the Constitution and laws of the United States in violation of the Fourteenth Amendment to that Constitution.

II. QUESTIONS PRESENTED.

A. Is misuse of power possessed by virtue of state law state action within the meaning of the Fourteenth Amendment even if that misuse is in excess of authority?

B. Does an arbitrary, wilful and malicious refusal by state officers to carry out the requirements of the state law with respect to an individual amount to a denial of the equal protection of the laws?

C. Does the Constitution of the United States protect the right of every qualified citizen to be a candidate for public office?

III. REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

A. The decision of the Circuit Court of Appeals is in conflict with the applicable decisions of this Court.

1. Misuse of power possessed by virtue of state law is state action within the meaning of the Fourteenth Amendment even if that misuse is in excess of authority.
2. Arbitrary refusal of state officers to accord an individual citizen the treatment required by state law and accorded to other citizens is a denial of the equal protection of the laws.

B. This case presents important questions of federal law which should be settled by this Court.

1. Has *Barney* v. *New York*, 193 U. S. 430 (1904), been overruled?
2. Does the Constitution of the United States protect the right of every qualified citizen to be a candidate for public office?

C. The decision of the Circuit Court of Appeals is in conflict with the decisions of other circuit courts.

Wherefore, your Petitioner prays this Court to issue its writ of certiorari to review the decision of the United States Circuit Court of Appeals for the Seventh Circuit in *Snowden* v. *Hughes, et al.*

Respectfully submitted,

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Respondents.

BRIEF IN SUPPORT OF THE PETITION FOR CERTIORARI.

STATEMENT OF THE CASE.

Petitioner, a duly qualified elector and candidate for the office of Representative in the General Assembly, was one of the two candidates for the Republican nomination receiving the highest number of votes in that primary (Tr. 5, 6-7). The Respondents Hughes and Lewis, and the decedent, Horner, were at that time Secretary of State, Treasurer, and Governor, respectively, of the State of Illinois, and were, *ex officio*, the State Primary Canvassing Board. Despite the fact that the Cook County Canvassing Board reported to the Respondent Hughes that the Petitioner was one of the two candidates receiving the highest

number of votes for the nomination as Republican candidates for Representative in the General Assembly, and despite the fact that the Respondent Hughes, acting Secretary of State, had published that fact under the seal of the State (Tr. 6-7), the State Primary Canvassing Board arbitrarily, wilfully, and maliciously failed and refused to certify Petitioner's nomination.

The Republican Senatorial Committee for the Third Senatorial District, where Petitioner was a candidate, had limited nominations for representatives by that party to two, and the Democratic Senatorial Committee in that district had limited nominations of that party to one (Tr. 4, 5). Since the Constitution of the State of Illinois provides for the election of three representatives from each Senatorial District, nomination was, therefore, tantamount to election (Tr. 6).

This action was brought in the District Court for the Northern District of Illinois, Eastern Division, under the authority of 8 U.S.C. §§ 41, 43, and 47(3), for damages on account of this deprivation by Respondents Hughes and Lewis and the decedent, of Petitioner's rights under the Constitution and laws of the United States. The district court sustained Respondents' motion to dismiss the complaint and that judgment was affirmed by the United States Court of Appeals for the Seventh Circuit (Tr. 29-33).

Grounds on Which Jurisdiction of This Court Is Invoked.

1. The decision of the Circuit Court of Appeals is in conflict with the applicable decisions of this Court.
2. This case presents important questions of federal law which should be decided by this Court.
3. The decision of the Circuit Court of Appeals is in conflict with the decisions of other circuit courts.

Specification of Errors.

The Circuit Court of Appeals erred in that:

1. It decided that "when the act complained of is plainly and clearly in violation of a state law, as in our case, it is not an act of the state for the purposes of the Fourteenth Amendment."
2. It refused to hold that the Petitioner had been deprived of rights guaranteed, secured, and protected by the Constitution and laws of the United States.

Summary of the Argument.

I The Decision of the Circuit Court of Appeals is in Conflict with the Applicable Decisions of this Court.

A. Misuse of power possessed by virtue of state law is state action within the meaning of the Fourteenth Amendment if that misuse is in excess of authority.

B. Petitioner was deprived of the equal protection of the laws of the State of Illinois by respondents exercising state authority in violation of the Fourteenth Amendment.

1. The "Equal Protection" clause applies to executive and administrative action.
2. Respondents' action was state action within the meaning of the Fourteenth Amendment.

C. Respondent deprived petitioner of a fundamental liberty without due process in violation of the Fourteenth Amendment.

1. Arbitrary and malicious action cannot constitute "Due Process".

II This Case Presents Important Questions of Federal Law Which Should Be Settled by this Court.

A. Whether the misuse of power possessed by virtue of state law is state action within the meaning of the Fourteenth Amendment, even if that misuse is in excess of authority, is important to the enforcement of the Fourteenth Amendment.

B. The extent of the protection affording the right of every citizen to be a candidate for public office by the Constitution of the United States is a fundamental question unsettled by this Court.

ARGUMENT.

I.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT.

A. Misuse of power possessed by virtue of state law is state action within the meaning of the Fourteenth Amendment even if that misuse is in excess of authority.

In affirming the judgment of the district court the court below said: "We conclude that when the act complained of is plainly and clearly in violation of a state law, as in our case, it is not an act of the state for the purposes of the Fourteenth Amendment" (Tr. 33). To support its conclusion the court relied on *Barney* v. *City of New York*, 193 U. S. 430 (1904).[1] While the court conceded that, "there can be no doubt that the broad language used in the *Barney* opinion is no longer accurate," it thought that, "the narrow holding of the *Barney* case still stands as a matter of law and as a matter of sound federal jurisprudence" (Tr. 33). We submit that this decision was contrary to an unbroken line of applicable decisions of this Court.

The first of these was in *Raymond* v. *Chicago Traction Co.*, 207 U. S. 20 (1907), which even the court below in this

[1] The court also cited and quoted from *Owensboro Co.* v. *Owensboro*, 200 U. S. 38, 47 (1906) (Tr. 32). The decision in that case, however, was based on this Court's conclusion that the action complained of did not result in the deprivation of a federal right.

case recognized as "limiting" the authority of the *Barney* case. In the *Raymond* case a suit was brought by the Traction Company to enjoin the taxing officers of Cook County from collecting certain taxes alleged to have been assessed by the State Board of Assessment in violation of the Fourteenth Amendment. The plaintiff's bill specifically set forth the provisions of the Illinois constitution and statutes requiring uniformity of taxation. The Circuit Court granted relief on the merits without discussing the question of jurisdiction.[2] In affirming the decree this Court said:

> "The most important function of the board, that of equalizing assessments, in order to carry out the provisions of the constitution of the State in levying a tax by valuation, 'so that every person shall pay a tax in proportion to the value of his, her or its property,' was, in this instance, omitted and ignored, while the board was making an assessment which it had jurisdiction to make under the laws of the State. This action resulted in an illegal discrimination, which, under these facts, was the action of the State through the board" (207 U. S. 20, 37).

Mr. Justice Peckham speaking for the majority in that case disposed of the *Barney* case by saying: "*Barney* v. *City of New York* . . . holds that where the act complained of was forbidden by the state legislature, it could not be said to be the act of the State. Such is not the case here."[3]

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[2] *South Chicago City Railway Co.* v. *Baird,* 114 Fed. 557 (C.C.N.D. Ill., 1902).

[3] *Ibid.* That distinction is of doubtful validity since the decision in the *Barney* case appears to have been based on the ground that the construction complained of there was "unauthorized" by the city and it had been so determined by the Supreme Court of New York. 193 U. S. 430, 437. In both the *Raymond* case and the instant case the action of the state officers complained of was "unauthorized" in that the applicable provisions of the State constitution and statutes did not authorize misuse of the delegated power.

In the instant case, as in the *Raymond* case, the applicable provisions of the state statutes and constitution required these Respondents to exercise their authority with uniformity. The gravamen of Petitioner's complaint is that they failed to do so in his case and the decision of the court below that their failure so to do was not "an action of the state for the purposes of the Fourteenth Amendment" is inconsistent with the decision of this Court in the *Raymond* case.

In *Siler* v. *Louisville and Nashville R. R.*, 213 U. S. 175 (1909), this Court sustained the jurisdiction of the Circuit Court to enjoin a maximum rate order issued by the Railroad Commission of Kentucky pursuant to a legislative act. In that case it was averred that the Railroad Commission had no power or authority to make or fix the rates complained of, "and that the Commission's order was unauthorized by statute." Of the objection to the lower court's jurisdiction based on the *Barney* case this Court said: "If the averment as to the invalidity of the order of the Commission were the only ground upon which a Federal question was founded, and if the bill alleged that the order was invalid because it was not authorized by the State, either by statute or in any other way, the objection might be good, but the bill sets up several Federal questions" (213 U. S. 175, 192). By this test likewise the instant case falls within the federal jurisdiction, for here as in the *Siler* case "the bill sets up several Federal questions" with respect to the scope and extent of the protection afforded by the Fourteenth Amendment.

Similarly this Court sustained the federal jurisdiction in *Des Moines* v. *Des Moines City Railway*, 214 U. S. 179 (1909). In that case the Circuit Court had enjoined the defendant city from impairing the obligation of a contract despite the city's claim that since there was a contract clause in the state constitution which would have invalidated such a law there was no state action and hence no

federal question. So little was this Court impressed by the jurisdictional question raised that, although that issue had been argued, the case was decided on its merits with no reference to the jurisdictional question.

The court below in the instant case cited *Home Telephone and Telegraph Co.* v. *Los Angeles,* 227 U. S. 278 (1913), but it failed to recognize its authority. In that case the petitioner sought an injunction in the federal district court to restrain the officials of the City of Los Angeles from enforcing a telephone rate ordinance on the ground that the rates were confiscatory and therefore in violation of the Fourteenth Amendment. The city filed a plea to the jurisdiction of the court setting up the due process clause of the California constitution which also prohibits confiscation, and the fact that there was no diversity of citizenship. This court reversed an order dismissing the bill for want of jurisdiction. Then Chief Justice White speaking for a unanimous court said:

> ". . . the settled construction of the [Fourteenth] Amendment is that it presupposes the possibility of an abuse by a state officer or representative of the powers possessed and deals with such a contingency. It provides, therefore, for a case where one who is in possession of state power uses that power to the doing of the wrongs which the Amendment forbids even although the consummation of the wrong may not be within the powers possessed if the commission of the wrong itself is rendered possible or is efficiently aided by the state authority lodged in the wrong-doer. That is to say, the theory of the Amendment is that where an officer or other representative of a State in the exercise of the authority with which he is clothed misuses the power possessed to do a wrong forbidden by the Amendment, *inquiry concerning whether the State has authorized the wrong is irrelevant* and the Federal judicial power is competent to

afford redress for the wrong by dealing with the officer and the result of his exertion of power" (227 U. S. 278, 287). (Italics supplied.)

Of the *Barney* case it was said: "... there is no ground for finding that that case is authority for overruling the settled doctrine, which, abstractly at least, it recognized. If there were room for such conclusion in view of what we have said it would be our plain duty to qualify and restrict the *Barney* case insofar as it might be found to conflict with the ruling here applied."[6] The instant case, like the *Home Telephone and Telegraph Co.* case, challenges the misuse of power by state officers to commit a wrong forbidden by the Fourteenth Amendment and we submit that here, too, "the Federal jurisdictional power is competent to afford redress for the wrong by dealing with the official and the result of his exertion of power."

Again in *Iowa-Des Moines National Bank* v. *Bennett*, 284 U. S. 239, 246 (1931), this Court held that "when a state official, acting under color of state authority, invades, in the course of his duties, a private right secured by the federal Constitution, that right is violated, even if the state officer not only exceeded his authority but disregarded special commands of state law." In that case this Court reviewed a decision of the Supreme Court of Iowa denying relief to two banks which complained of unequal taxation contravening both the state law and the equal protection clause of the Fourteenth Amendment. While the state court found, or assumed, systematic discrimination as charged, it declared that the wrongful exaction was made without authority from the state and that the banks had no other remedy than to await action by the taxing authorities to collect the taxes remaining due from their competitors or to initiate proceedings themselves to compel such collection.

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[6] 227 U. S. 278, 294.

Mr. Justice Brandeis speaking for the court, found no cause to discuss the *Barney* case at any length because the *Iowa-Des Moines* case arose in a state court, but he said: "Some expressions in the opinion in the *Barney* case, said to be inconsistent with the conclusions stated above, have been disapproved by this court. *Home Tel. & Tel. Co.* v. *Los Angeles*, 227 U. S. 278, 294" (284 U. S. 239, 247).

Most recently in *United States* v. *Classic*, 313 U. S. 299, 326 (1941), this Court had occasion to say: "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken 'under color' of state law." In that case this Court held that fraudulent acts by Louisiana election officials amounted to a deprivation of rights secured and protected by the Constitution and laws of the United States in violations of §§ 19 and 20 of the Criminal Code (18 U.S.C. §§ 51, 52). Those sections and 8 U.S.C. §§ 41, 43, and 47(3) on which Petitioner relies, are all part of the statutory scheme devised by the Congress to effectuate the purposes of the Fourteenth Amendment. The tests for determining what action is "state action" must be the same for both the criminal and civil liability. The conduct of the state officers in the instant case was exactly parallel to that of the respondents in the *Classic* case. It follows, therefore, that the decision of the court below in the instant case was inconsistent with the decision of this Court in the *Classic* case.

The importance of the effect of state law on the determination of what constitutes state action for the purposes of the Fourteenth Amendment has been considered by this Court in all of the cases discussed. In all of them, this Court had decided that misuse of power possessed by virtue of state law and made possible only because of the authority of the state law is "state action" within the meaning of the Fourteenth Amendment. The decision of the court below in the instant case is inconsistent, therefore, with the applicable decisions of this Court.

B. Petitioner was deprived of the equal protection of the laws of the State of Illinois by respondents exercising state authority in violation of the Fourteenth Amendment.

Petitioner and one Charles J. Jenkins were the two candidates receiving the highest number of votes for the Republican nomination for representative in the General Assembly at the primary on April 9, 1940 (Tr. 5). Under the provisions of the Illinois statutes it was the duty of the Respondents Hughes and Lewis and the decedent Horner as members of the State Primary Canvassing Board to receive the tabulated statements of the results of the votes cast in the primary from the canvassing boards of the counties in the state, to canvass those results and to proclaim that the candidates receiving the highest number of votes had been nominated. In this case the Respondent, Edward J. Hughes, Secretary of State, received the tabulated statement of returns from the Canvassing Board for Cook County and the County Clerk of Cook County showing that Petitioner and Charles J. Jenkins were the two candidates receiving the highest number of votes for the Republican nomination for Representative in the General Assembly in the Third Senatorial District. Moreover, the Respondent Hughes compiled, certified and issued for public distribution a pamphlet under the state seal setting forth that fact. Nevertheless, on April 29, 1940, the State Primary Canvassing Board issued its official proclamation designating only Charles J. Jenkins as nominee of the Republican Party. In failing to fulfill the obligation imposed upon them by the state law, these state officers denied to Petitioner the equal protection of the laws which the Fourteenth Amendment to the Constitution of the United States requires of every state and its officers.

It is a fundamental principle of our democratic government that every person within the jurisdiction of the State

shall be treated equally in the application and enforcement of the laws of that state. The late Chief Justice Taft fully described the scope of this obligation of the several states of the Union in *Truax* v. *Corrigan*, 257 U. S. 312, 331-333 (1921), where he said:

> "This brings us to consider the effect in this case of that provision of the Fourteenth Amendment which forbids any State to deny to any person the equal protection of the laws. The clause is associated in the Amendment with the due process clause and it is customary to consider them together. It may be that they overlap, that a violation of one may involve at times the violation of the other, but the spheres of the protection they offer are not coterminous. The due process clause, brought down from Magna Charta, was found in the early state constitutions, and later in the Fifth Amendment to the Federal Constitution as a limitation upon the executive, legislative and judicial powers of the Federal Government, while the equality clause does not appear in the Fifth Amendment and so does not apply to congressional legislation. The due process clause requires that every man shall have the protection of his day in court, and the benefit of the general law, a law which hears before it condemns, which proceeds not arbitrarily or capriciously but upon inquiry, and renders judgment only after trial, so that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society. *Hurtado* v. *California*, 110 U. S. 516, 535. It, of course, tends to secure equality of law in the sense that it makes a required minimum of protection for every one's right of life, liberty and property which the Congress or the legislature may not withhold. Our whole system of law is predicated on the general, fundamental principle of equality of application of the law. 'All men are equal before the law,' 'This is a government of

laws and not of men,' 'No man is above the law,' all are maxims showing the spirit in which legislatures, executives said courts are expected to make, execute and apply laws. But the framers and adopters of this Amendment were not content to depend on a mere minimum secured by the due process clause, or upon the spirit of equality which might not be insisted on by local public opinion. They therefore embodied that spirit in a specific guaranty.

"The guaranty is aimed at undue favor and individual or class prejudice, on the one hand, and at hostile discrimination or the operation of inequality on the other. It sought an equality of treatment of all persons, even though all enjoyed the protection of due process. Mr. Justice Field, delivering the opinion of this Court in *Barbier* v. *Connolly*, 113 U. S. 27, 32, of the equality clause, said—'Class legislation, discriminating against some and favoring some, is prohibited, but legislation which, in carrying out a public purpose is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the Amendment.' In *Hayes* v. *Missouri*, 120 U. S. 68, the Court speaking through the same Justice said the Fourteenth Amendment 'does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed.'"

To the same effect was the statement of Mr. Justice McReynolds in *Sunday Lake Iron Co.* v. *Township of Wakefield*, 247 U. S. 350, 352 (1918), where he said:

"The purpose of the equal protection clause of the XIV Amendment is to secure every person within

> the state's jurisdiction against intentional and arbitrary discrimination whether occasioned by express terms of a statute or by its improper execution through duly constituted agents. . . ."

This proposition was applied by this Court in *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337 (1938). There petitioner, a Negro, had been denied admission to the school of law of the State University of Missouri solely on account of his race and color. After observing that the separate school system for Negroes which the State of Missouri had provided did not include an opportunity for legal education, the court held that in refusing Gaines the opportunity which was available to white citizens of the State, the State was violating the "Equal Protection" clause of the Fourteenth Amendment. The Court recognized the validity of the proposition that no citizen of a state had a *right* to education at the expense of the state, but said:

> "By the operation of the laws of Missouri a privilege had been created for white law students which is denied to Negroes by reason of their race. The white resident is afforded legal education within the State; the Negro resident having the same qualification is refused it there and must go outside of the state to obtain it. That is the denial of the equality of legal right to the enjoyment of the privilege which the state has set up, and the provision of the payment of tuition fees in another state does not remove the discrimination." 305 U. S. 337, 349; 83 L. Ed. 208, 213.

A state court reached the same conclusion, in *U. of Md.* v. *Murray*, 169 Md. 478; 182 Atl. (Md.) 590 (1935).

On the same principle federal courts have held that the payment of Negro teachers on a scale different from that

set up for white teachers violates the equal protection clause. *Alston* v. *School Board of the City of Norfolk*, 112 F. (2d) 992, cert. den. 311 U. S. 693 (1940); *Mills* v. *Lowndes*, 26 F. Supp. 792 (1939) and *Mills* v. *Board of Education of Anne Arundel County*, 30 F. Supp. 245 (1939).

It is significant that all of these cases proceed upon the theory that the requirement of the equal protection clause of the Fourteenth Amendment is met only by actual equality of treatment of every person within the jurisdiction of the state. As the then Chief Justice said in the *Gaines* case, *supra*:

> "Here petitioner's right was a personal one. It was as an individual that he was entitled to the equal protection of the laws, . . ." 305 U. S. 337, 351.

In the instant case Petitioner invokes the aid of the federal courts in securing redress for Respondents' denial to him of the equality of treatment and equal protection of the laws which the Constitution of the United States requires. Petitioner has alleged, and Respondents have admitted, that in carrying out their official functions in connection with the primary of April 9, 1940, these respondents wilfully, arbitrarily, and maliciously refused to obey the clear and express provision of the laws of the State of Illinois. Their action violated the requirement of the "Equal Protection" clause.

1. The "Equal Protection" clause applies to executive and administrative action.

Like the other provisions of Section One of the Fourteenth Amendment the "Equal Protection" clause applies to action by executive and administrative officers of the state as well as to legislative action. This was recognized in *Truax* v. *Corrigan*, *supra*, and in the leading case of

Yick Wo v. *Hopkins*, 118 U. S. 356 (1886). In the latter case the court considered the complaint of Chinese residents of the State of California that an ordinance of the City of San Francisco, which required a license to operate a laundry in a frame building, was administered in such a fashion as to prevent Chinese from operating laundries in such buildings although permitting white persons to do so. After pointing out that the ordinance was fair enough on its face the court came to the conclusion that,

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority by an evil eye and an unequal hand so as to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the provision of the constitution." 118 U. S. 356, 373-374.

That conclusion fits the instant case precisely. Here, too, the statute is fair upon its face. It required Respondents to tabulate the results reported to them by the Canvassing Board of the several counties within the State and prescribed that these defendants acting as the State Primary Canvassing Board should proclaim the results of this tabulation. But the actual administration of the law fell far short of the level required by the Fourteenth Amendment since these defendants arbitrarily and wilfully refused to comply with its terms in the case of the returns from the Third Senatorial District.

The cases cited heretofore in this section all sustain the proposition of the applicability of the "Equal Protection" clause to administrative and executive action. In the *Gaines* case, *supra*, the acts complained of were those of the registrar of the state university. Clearly he was an administrative officer. A similar officer was involved in the

University of Maryland case, *supra*. In the *Alston* and *Mills* cases the defendants were superintendents and members of boards of local school districts. The administrative character of those offices is clear. Like Respondents in the instant case all of those officers were engaged in administration of laws passed by the particular state legislature. Like Respondents here their administration should have met the test of "Equal Protection," but did not.

2. Respondents' action was state action within the meaning of the Fourteenth Amendment.

It has already been demonstrated hereinbefore that the fact that the acts done by the Respondents complained of here were violative of the state law did not remove them from the prohibition of the Fourteenth Amendment. In addition it should be pointed out that under the decisions of this Court the action of Respondents was state action within the meaning of the Fourteenth Amendment.

Ex officio, the governor, secretary of state, and state treasurer are members of the State Primary Canvassing Board in Illinois. (Ill. Rev. Stats. Chap. 46, sec. 456.) In carrying out the functions of that board those officers, Respondents here, are engaged in "state action" within the meaning of that phrase as used by the courts in construing the Fourteenth Amendment. *Standard Scale Co.* v. *Farrell*, 249 U. S. 571, 577 (1919).

The sole source of authority in these officers to canvass the results of a primary election is the delegation by the legislature referred to above. The result is that these officers are empowered to exercise the legislative and executive power of the state. It is clear that such delegated power must be exercised with a due regard to the limitations of the Fourteenth Amendment. *Standard Scale Co.* v. *Farrell, supra; Ex parte Young*, 209 U. S. 123; 52 L. Ed. 714 (1908); *Home Telephone & Telegraph Co.* v. *City of Los Angeles, supra.*

The fact that this was a primary election rather than a general election did not affect the obligation of defendants to perform their duties in accordance with the Constitution of the United States. In Illinois the conduct of primary elections is a function of the state as evidenced by the elaborate regulations adopted by the legislature for their conduct, the fact that the cost is borne by the state treasury and the history of primaries in the state. *United States* v. *Classic*, 313 U. S. 299 (1941); *West* v. *Bliley, et al.*, 33 F. (2d) 177 (1929); affirmed 42 F. (2d) 101 (1930), and *People ex rel. Breckon* v. *Board of Election Commissioners*, 221 Ill. 9, 77 N. E. 321 (1906).

C. Respondents deprived petitioner of a fundamental liberty without due process in violation of the Fourteenth Amendment.

The right of which Petitioner was deprived by these state officers, Respondents here, was a right which every duly qualified citizen must have under our representative form of government; that is, the right of equality of opportunity to be chosen a representative of the people in the conduct of the affairs of government. That right is a fundamental civil right. Unless its existence is judicially recognized and protected a republican form of government is impossible. If no such right exists, then government by the will of the governed is impossible. The people under those circumstances would be at the mercy of those who, cloaking their actions under color of state authority, chose to ignore the will of the electorate. The Supreme Court of Illinois considers the right of Petitioner fundamental and says: "Every citizen has the right of voting for public office and being elected," *Fletcher* v. *Tuttle*, 151 Ill. 41, 53; 37 N. E. 683, 686 (1894). It is every citizen's right to share his government's offices and to engage in administering its functions. *Crandall* v. *Nevada*, 73 U. S. 35, 44 (1867).

While specific judicial recognition of this right is sparse, the whole history of the Fourteenth Amendment and its judicial construction supports petitioner's contention here. In *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589 (1897), this Court said:

> "The liberty mentioned in that Amendment means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to impress the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling, to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned."

From a number of cases decided thereafter, it is apparent that this Court has construed the term "liberty," as used in the Fourteenth Amendment, to include the broad, fundamental, natural rights of free men in a free society and the Fourteenth Amendment has regularly been construed as protecting those rights against interference by state action without due process of law. See *Coppage* v. *Kansas*, 236 U. S. 1 (1915); *Truax* v. *Raich*, 239 U. S. 33 (1915); *Butler* v. *Perry*, 240 U. S. 328 (1916); *Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U. S. 522 (1923); *People* v. *Hurlbut*, 24 Mich. 44, 107, 9 Am. Rep. 103, 114, 115 (1871).

In a number of subsequent decisions this Court has continued development of that basic concept of "liberty." Finally, in *Minersville School District* v. *Gobitis*, 310 U. S. 586 (1940), Mr. Justice Frankfurter pointed out the conflict presented in that case between the right of religious freedom, on the one hand, and the necessity of the main-

tenance of a government strong enough to protect this religious liberty on the other. The Court's decision in that case was based on the conclusion that only by the maintenance of an organized political society could freedom of religious worship be protected.

In the instant case Petitioner asks this Court to protect against arbitrary action by state officers a basic and fundamental requirement of an organized political society. Only if the Fourteenth Amendment prohibits arbitrary and discriminatory refusal by state officers to carry out the dictates and mandates of the electorate is an organized representative government possible.

We submit that in a republic dedicated to the principle of preservation of the representative form of government no civil right could be more important than the right of every qualified citizen to be a candidate for a representative office. The gravity of Respondents' conduct in the instant case is accentuated by the fact that it stands admitted in this Court that Petitioner had been duly nominated by the electorate of the Republican party at the primary involved here and that Respondents, state officers, had refused to proclaim that fact. If the liberty protected by the Fourteenth Amendment does not include the right to equal opportunity to serve in the legislative councils of the republic and the right to equal treatment at the hands of government officers in the application and the enforcement of the laws of the state, (See Point B, *supra*), the security and the protection of organized political society that this Court found to be inherent in our form of government in the *Minersville* case has no meaning.

1. Arbitrary and malicious action cannot constitute "Due Process."

It has been uniformly agreed by all courts that have considered the meaning of the "Due Process" clause that

it forbids arbitrary and discriminatory action by state officials. In *Hurtado* v. *California*, 110 U. S. 516, 535 (1884), Mr. Justice Matthews expressed the idea in the following language:

> "In the Fourteenth Amendment, by parity of reason, (due process) refers to that law of the land in each State, which derives its authority from the inherent and reserved powers of the State, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions, and the greatest security for which resides in the right of the people to make their own laws, and alter them at their pleasure. • • •
>
> "But it is not to be supposed that these legislative powers are absolute and despotic, and that the amendment prescribing due process of law is too vague and indefinite to operate as a practical restraint. It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power. It must be not a special rule for a particular person or a particular case, but, in the language of Mr. Webster, in his familiar definition, 'the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial,' so 'that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society,' and thus excluding, as not due process of law, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments and decrees, and other similar special, partial and arbitrary exertions of power under the forms of legislation. Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the

decree of a personal monarch or of an impersonal multitude. And the limitations imposed by our constitutional law upon the action of the governments, both State and national, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. The enforcement of these limitations by judicial process is the device of self-governing communities to protect the rights of individuals and minorities, as well against the power of numbers, as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the government."

That fundamental proposition has been affirmed again and again by both state and federal courts. So well settled is the proposition that we refer this Court to only a few of the authorities. *Truax* v. *Corrigan*, 257 U. S. 312, 332 (1921); *Yick Wo* v. *Hopkins*, 118 U. S. 356, 366 (1886); *People* v. *Niesman*, 356 Ill. 322, 326, 190 N. E. 668 (1934); *Josma* v. *Western*, 249 Ill. 508, 514; 94 N. E. 945, 946 (1911); *Gillespie* v. *People*, 188 Ill. 176, 182, 183; 58 N. E. 1007, 1009.

The Supreme Court of Illinois has adopted the broader concept of the rights guarded and protected by the "Due Process" clause of the Constitution and says: "These terms, 'life', 'liberty' and 'property', embrace every personal, political and civil right which any person within the state may possess," (249 Ill. 508, 514; 94 N. E. 945, 946). Our liberties, personal, civil, political—in short, all that makes life worth living are grouped in these words. *State* v. *Julow*, 129 Mo. 163, 172, 173 (1895).

In the instant case Respondents arbitrarily and maliciously, and without any opportunity to Petitioner to be heard in the matter, refused to obey the general law laid down by the Legislature of the State of Illinois for the

conduct of primary elections. Despite the clear requirement of the state Election Laws, (Ill. Rev. Stats. ch. 46, §§ 454 and 456), that they should proclaim as nominated those two persons having the highest number of votes, these Respondents made a "special" rule to deal with the case of Petitioner. In spite of the fact that Petitioner had received the second highest vote in his district, and that fact had been attested to by one of these Respondents, Edward J. Hughes, over the great seal of his office, these Respondents arbitrarily refused to proclaim Petitioner's nomination.

We submit that the very purpose of the "Due Process" clause was to protect all persons from such high-handed and outrageous actions as these. In the language of the *Hurtado* case quoted above, such "arbitrary power enforcing its edicts to the injury of the persons and property of its subjects is not law." Rather it is anarchy, and the courts of the United States have been delegated the function of protecting persons like Petitioner from such unlawful conduct.

II.

THIS CASE PRESENTS IMPORTANT QUESTIONS OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT.

A. Whether the misuse of power possessed by virtue of state law is state action within the meaning of the Fourteenth Amendment, even if that misuse is in excess of authority, is important to the enforcement of the Fourteenth Amendment.

The reliance by the court below on *Barney* v. *New York*, *supra*, in reaching a decision which is contrary to the decisions of this Court discussed in Point I hereof, re-

quires that this Court review this case. Most state constitutions contain "Due Process" clauses similar in content and construction to that of the Fourteenth Amendment to the Constitution of the United States. Enforcement of the Fourteenth Amendment, therefore, requires that this Court review and reverse the decision of the United States Circuit Court of Appeals for the Seventh Circuit in the instant case in order to prevent possible conflicts and confusion among the district and circuit courts in their enforcement of the Fourteenth Amendment and other constitutional limitations on state action.

The importance of this question goes far beyond the instant case. It includes the whole range of cases and problems arising with respect to the limitations contained in the Constitution on the powers of the states. Judicial protection of the rights secured by those limitations on state action depend upon this Court's construction of those limitations. It is vital to that judicial protection that the question wrongly decided by the court below be considered by this Court.

B. The extent of the protection affording the right of every citizen to be a candidate for public office by the Constitution of the United States is a fundamental question unsettled by this Court.

Mr. Justice Fields, speaking for this court, in *Cummings* v. *Missouri*, 71 U. S. (4 Wall) 277, 321 (1866), said:

> "The theory upon which our political institutions rest is, that all men have certain inalienable rights—that among these are life, liberty and the pursuit of happiness; and that in the pursuit of happiness all avocations, all honors, all positions, are alike open to every one, and that in the protection of these rights all are equal before the law."

Judge Cooley, speaking for the Supreme Court of Michigan, says that "Constitutional freedom means something

more than liberty permitted; it consists in the civil and political rights which are absolutely guaranteed, assured and guarded; in one's liberties as a man and a citizen—his right to vote, his right to hold office," that they are guarded and protected and not held at the mercy and discretion of any one man. *People* v. *Hurlbut*, 24 Mich. 44, 107.

Existence of orderly representative government in the absence of constitutional limitation on arbitrary action by state officers which interferes with the choice of representatives in legislative councils is impossible. The instant case raises squarely the question to whether the Constitution prohibits arbitrary interference by state officers with the exercise of the choice of representatives by the people. It is important to continuation of orderly representative government in the several states that this Court determine the extent of protection afforded by the federal Constitution and the federal courts against arbitrary action by state officers even in state elections.

CONCLUSION.

We submit that this Court should review the decision of the United States Circuit Court of Appeals for the Seventh Circuit affirming the dismissal of Petitioner's complaint and that the decision should be reversed.

Respectfully submitted,

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CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1943

No. 57

JOSEPH E. SNOWDEN,

Petitioner,

vs.

EDWARD J. HUGHES, LOUIE F. LEWIS AND ROBERT E. STRAUS, ELI M. STRAUS AND JAMES LEVY, AS CO-EXECUTORS OF THE LAST WILL AND TESTAMENT OF HENRY HORNER, DECEASED,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF FOR PETITIONER TO BRIEF OF THE RESPONDENTS ROBERT E. STRAUS, ELI M. STRAUS AND JAMES LEVY, AS CO-EXECUTORS OF THE LAST WILL AND TESTAMENT OF HENRY HORNER, DECEASED.

FILED BY LEAVE OF COURT.

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INDEX

PAGE

Statement 1

Argument 3

Summary of the argument:

The question of survivorship of petitioner's cause of action against the executors of the estate of Henry Horner is governed by the survivorship statute of the State of Illinois.

List of Authorities Cited.

Cairo et al. v. Est. of Gingham, 268 Ill. App. 510, 513 5

Devine v. Healy, 241 Ill. 34, 37 5

Erie R. Co. v. Tompkins, 304 U. S. 64, 79 ..... notes 2, 4 3, 6

Francis v. Humphrey, 25 F. Supp. 1, 3 4

Garrett v. Moore-McCormack Co., 317 U. S. 239, 245 ..... notes 3, 5 4, 6

Luster v. Martin, 58 F. 2nd, 537, 539 5

Patton v. Brady Ex., 184 U. S. 608, 612 ..... note 1 3

Statutes.

Ill. Rev. Stat., 1941, chap. 3 par. 494 ..... 4, 5

28 U. S. C. A. 778 3

28 U. S. C. A. Rule 25 foll. sec. 723c ..... note 1 3

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PAGE

1

3

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5

5

3, 6

4

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4, 6

5

3

FILED BY LEAVE OF COURT.

4, 5

3

3

STATEMENT.

MAY IT PLEASE THE COURT:

As the respondents, Robert E. Straus, Eli M. Straus and James Levy, executors, elected to file a brief in addition to

the brief opposing petition for certiorari and in said brief presents, for this Honorable Court's consideration, the question as to whether or not petitioner's cause of action survived the death of Henry Horner. This question was argued fully before the Circuit Court of Appeals by the said respondents. Leave was given by this Court, at the argument of this matter before this Court, to file a reply to respondents' brief on said question of survivorship.

ARGUMENT.

Respondents, Robert E. Straus, Eli M. Straus and James Levy, executors, in their brief, rely upon the proposition that "There is no general federal statute governing survival of actions." They further argue that "the question whether the cause of action survives the death of the alleged wrongdoer must be decided in accordance with the common law." Respondents further contend that the Illinois statutes on abatement or survival of actions have no bearing on a suit to *recover damages* under the federal Civil Rights Act.

While, strictly speaking, there may be no survivorship statute of the United States, this Court has held that while "Congress has not, speaking generally, attempted to prescribe the causes which survive the death of either party. Sec. 955, Rev. Stat. (28 USCA 778) provides that—'when either of the parties, • • • prosecute or defend and such suit to final judgment.'

"This does not define the causes which survive. In the absence of some special legislation the question in each case must be settled by the common law or the law of the State in which the cause arose."[1] "The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else • • •.

> "the authority and only authority is the State, and if that be so, the voice adopted by the State as its own (whether it be of its Legislature or of its Supreme Court) should utter the last words."[2]

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[1] *Patton* v. *Brady, Ex.*, 184 U. S. 608, 612. See Rule 25 under Title 28 foll. #723c.

[2] *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 79.

Mr. Justice Black speaking for this Court said "The constant objective of legislation and jurisprudence is to assure litigants full protection for all substantive rights intended to be afforded them by the jurisdiction in which the right itself originates."[3]

The substantive law of Illinois as expressed by its Statutes with reference to survivorship is declared in Chapter 3, Paragraph 494, Ill. Rev. Stat. 1941, in the following language:

> "Actions Which Survive. In addition to the actions which survive by the common law, the following also survive: actions of replevin, actions to recover damages for an injury to the person (except slander and libel), actions to recover for an injury to real or personal property, *actions against officers for misfeasance, malfeasance or nonfeasance* of themselves or their deputies * * *."

Petitioner contends that the question of survivorship in this matter is and should be controlled by the statutes and jurisprudence of the State of Illinois. Judge Wham in the case of *Francis* v. *Humphrey*, 25 Fed. Suppl. 1, a case decided in District Court, Eastern Division of Illinois, on page 3 had the following to say:

> "But the decision in *Erie R. Co.* v. *Tompkins, supra*, has legally speaking, 'turned the world upside down.' By that decision the independent body of so-called federal substantive law under the doctrine of *Swift* v. *Tyson, supra*, ceased to be controlling authority in the Federal Courts. Now each Federal Court must follow the substantive law of the state where the particular court is located or the state where the action arose, as settled and declared by the courts of that state. Now the substantive laws of Illinois, as established by the decisions of her courts, as well as by her

[3] *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 245.

> statutes, must be regarded as the controlling rules of decision in the trial of actions arising in that state in the federal courts."

The above case is cited for the Court's information as to the opinion of the Judges of the District Courts of Illinois.

In *Devine* v. *Healy*, 241 Ill. 34, the question of survivorship was before the Supreme Court of Illinois and after a review of the common law rule the Court, on page 37, stated:

> "With the law in this condition the Legislature, in 1872, enacted Section 122, Chapter 3, Hurd's Rev. Stat. 1908 (now Sec. 494, Chap. 3, Ill. Rev. Stat. 1941). * * * This section provides for the survival of any action therein designated if the party aggrieved, or the wrongdoer, or both, should die."

In *Cairo et al.* v. *Estate of Bingham*, 268 Ill. App. 510, the clause of the section of the Illinois statute was under consideration and the Court said, page 513:

> "Among these are 'actions against officers for misfeasance, malfeasance or nonfeasance of themselves or their deputies.' *Manifestly this means public officers.*"

Mr. Justice Evans in the case of *Luster* v. *Martin* (C. C. A. 7), 58 F. 2nd 537, at page 539 said:

> "Whether a pending action may be revived upon the death of either party depends primarily upon the laws of the jurisdiction in which the action was commenced."

In that case the question of survivorship was predicated upon the fact that the Wisconsin statute, the state in which the action was commenced, expressly provided for the survival of actions of the character before the Court.

Respondents have cited many cases a reading of which will show that none of the cases are in any way persuasive as to the conception of the law as the respondents would have the Court to view it.

The rule of law as announced by our Federal Courts and the Federal Statutes is that "the question in each case must be settled by the common law or the law of the state in which the cause arose." "The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally speaking but the law of that State existing by the authority of that State."[4] And by the law of the State of Illinois, as expressed in its substantive law the present cause of action survived against the executors of the estate of Henry Horner. And again quoting the words of Mr. Justice Black that "the constant objective of legislation and jurisprudence is to assure to litigants full protection for all substantive rights intended to be afforded by the jurisdiction in which the right itself originates."[5]

Respectfully submitted,

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WILLIAM R. MING, JR.,
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[4] *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 79.
[5] *Garrett* v. *Moore-McCormack*, 317 U. S. 239, 245.

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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 991

JOSEPH E. SNOWDEN,

Petitioner,

vs.

EDWARD J. HUGHES, LOUIE E. LEWIS AND ROBERT E. STRAUS, ELI M. STRAUS AND JAMES LEVY, AS CO-EXECUTORS OF THE LAST WILL AND TESTAMENT OF HENRY HORNER, DECEASED,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO SUPREME COURT OF ILLINOIS.

BRIEF OF THE RESPONDENTS EDWARD J. HUGHES AND LOUIE E. LEWIS IN OPPOSITION TO PETITIONER'S PETITION FOR THE WRIT OF CERTIORARI.

GEORGE F. BARRETT,
Attorney General of the State of Illinois,
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THE BUNTHORP-WARREN PRINTING COMPANY, 211 WEST JACKSON, CHICAGO 56

SUBJECT INDEX.

	PAGE
Respondents' Additional Statement of the Matters Involved	3
Summary of Argument	5
Argument:	
I. The Decision of the Circuit Court of Appeals Was Correct for the Reason Given in the Opinion. The Acts Charged, Having Been Prohibited by Statute, Were Not Those of the State or of the Defendants in Their Official Capacity	6
II. The Complaint Fails to State a Cause of Action Under the Civil Rights Act because:	
(1) The right of candidacy for nomination at a primary election is not a civil right either apart from or under the constitution of the United States; and	
(2) The official proclamation of the plaintiff's failure to achieve nomination, such proclamation being made by the defendants as public officers, is conclusive and cannot be collaterally attacked	12
Conclusion	19

Table of Cases Cited.

Barney v. City of New York, 193 U. S. 430 10
Blackman v. Stone, 17 Fed. Supp. 102 15
Classic v. United States, 313 U. S. 299 11
Des Moines v. Des Moines City Railway Co., 214 U. S. 179 11
Donovan v. Comerford, 332 Ill. 230 14
Harding v. Gilbert, 373 Ill. 94 14
Home Telephone Co. v. Los Angeles, 227 F. S. 278 11
McKinley v. Chicago, 369 Ill. 268 14
Snowden v. Hughes, et al., 132 F. 2d 476 1
Taylor v. Beckham, 178 U. S. 548; 44 L. Ed. 1187 ..... 15, 18

Statutes.

Amendment XIV, Constitution of the United States 6
U. S. C. A. Title 8, Sections 41, 43 and 47 (3); R. S. 1977, 1979-20; 17 Stat. 13, c. 22, Sec. 1-2; 12 Stat. 284, c. 33 9

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Opinion Below.

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit is reported in 132 F. 2d 476.

The decree rendered (Rec. 14) by the District Court of the United States for the Northern District of Illinois, Eastern Division, dismissing the suit as to the Horner

executors and Edward J. Hughes, was entered November 21, 1941. A similar order sustaining the motion to strike and dismissing the suit as to the remaining defendant, Louie E. Lewis, was entered December 11, 1941 (Rec. 17).

Jurisdiction.

Respondents submit that this court should not take jurisdiction because no federal question is involved, no cause of action having been stated either under the Civil Rights Act or under the Fourteenth Amendment.

RESPONDENTS' ADDITIONAL STATEMENT OF THE MATTERS INVOLVED.

The present brief is intended to supplement the brief on behalf of the respondent executors of Henry L. Horner, deceased. It will not reiterate the substance of the argument presented in that brief; but it is felt that this court's deliberations may be assisted if certain considerations, additional to those submitted in the brief of the executors, are suggested in opposition to the granting of the present writ and if certain additional authorities deemed pertinent by counsel writing this brief are cited and discussed.

The opinion of the Circuit Court of Appeals grounds that court's decision entirely upon the principle that where an act is plainly and clearly forbidden by a state statute, the commission of that act, even if it results in a denial of "due process of law" or of "equal protection of the law", is nevertheless not such denial of due process or equal protection *by the state;* and this is true notwithstanding the fact that the actor is a state officer.

Since the Circuit Court of Appeals regarded this principle as a sufficient basis for affirming the decision of the District Court, the Circuit Court of Appeals did not find it necessary even to indicate that other important contentions were made by the appellees there (respondents here) in support of the District Court's judgment.

Although the respondents agree with the view of the Circuit Court of Appeals that this single principle is decisive of the instant case, nevertheless the respondents desire to indicate in this statement and urge in the argument in this brief additional grounds for the support of the decisions of the District and of the Circuit Court of Appeals.

Accordingly the respondents here indicate, without argument in this statement, the following such additional grounds for the affirmance of the decision of the District and of the Circuit Court of Appeals:

(1) The right of candidacy for nomination at a primary election is not a civil right either apart from or under the Constitution of the United States; and

(2) The official proclamation of the plaintiff's failure to achieve nomination, such proclamation having been made by the defendants as public officers, is conclusive and cannot be collaterally attacked.

The contentions above indicated, as well as the view expressed by the Circuit Court of Appeals, will be defended in the Argument in this brief. Throughout the argument the respondents will be referred to as "defendants".

SUMMARY OF ARGUMENT.

I.

The decision of the Circuit Court of Appeals was correct for the reason given in the opinion. The acts charged, having been prohibited by statute, were not those of the state or of the defendants in their official capacity.

II.

The complaint fails to state a cause of action under the Civil Rights Act because:

(i) The right of candidacy for nomination at a primary election is not a civil right either apart from or under the Constitution of the United States.

(ii) The official proclamation of the plaintiff's failure to achieve nomination, such proclamation being made by the defendants as public officers, is conclusive and cannot be collaterally attacked.

ARGUMENT.

I.

The decision of the Circuit Court of Appeals was correct for the reason given in the opinion. The acts charged having been prohibited by statute, the acts charged were not those of the state or of the defendants in their official capacity.

It is important to observe, at the very threshold of this case, that the plaintiff did not seek to prevent or undo any act of the State of Illinois. He did not seek to annul any judgment, install himself in any office, restrain any threatened unconstitutional prosecution or confiscation of his property, relieve himself from imprisonment or preserve his life under the Fourteenth Amendment.

He sought an award of damages against the defendants in their **individual capacities, to be satisfied from their private fortunes.** This is, of course, precisely the relief contemplated by the Civil Rights Acts **when the cause of action arises under that act.**

But in order to impress upon the facts pleaded the modality of a cause of action under the Civil Rights Act, he does not resort to the provisions of that act in so far as they were intended to prohibit racial discrimination. He relies upon the more general import of the equal protection clause of the Fourteenth Amendment.

Now the Fourteenth Amendment provides—not that no one shall suffer deprivation of life, liberty or property without due process of law or that none shall suffer the denial of equal protection—but that no **state** shall deny due process or equal protection.

In other words, in order to sustain his case, the plaintiff must treat the acts complained of as those of the state

in so far is they deny to him due process. Otherwise he makes no case under the Fourteenth Amendment. But, after having thus imputed the acts in question to the state, he must regard them as torts committed by the defendants as individuals for the purpose of amercing those individuals in damages.

It is easy to perceive that a public official, acting contrary to even the purport of a state's authority, acting maliciously and criminally, may incur private liability at common law, or under state statute. It is easy to perceive that an official clothed with discretion may exercise it so arbitrarily that, when his ruling, decision or other conduct is enforced by the courts or by the state's constabulary, the act may be so far that of the state as to amount to a denial of due process or of equal protection. But it is impossible to perceive how an act may be that of the state for the purpose of charging the state with denial of equal protection and yet so far a mere private tort **under the very laws of that state** as to entitle the plaintiff to sue under the Civil Rights Act when the state has not sanctioned the violation of its own laws by the action of its courts, its police force or its legislature.

A series of brief illustrations will make this point clear. Every larceny is a deprivation of property; and, since it is not deprivation by due process of law, it is obviously a deprivation without such due process. Every felonious homicide or kidnaping is likewise a deprivation of life or liberty, similarly without due process of law. But neither the trespass to goods in the larceny case, the killing in the homicide case nor the abduction in the kidnaping case is a violation of the Fourteenth Amendment because the act is not that of the state.

Now let us suppose that the trespasses above considered were committed by a police officer incidentally to an unlawful and malicious arrest in which the victim was denied his liberty, suffered a theft of his property or was killed.

If the premise of the plaintiff in the instant case is well conceived; the mere fact that the perpetrator of these torts (and crimes) was a police officer purporting to make an arrest under state law would afford the victim or his representative access to the federal courts under the Civil Rights Act. The officer having been a representative of the state, the acts would constitute a denial of due process and equal protection under the Fourteenth Amendment—which means by the state.

If the state so far sanctioned or condoned this misconduct by its officer as effectively to deny the victim or his representative access to the courts or process for the enforcement of civil liability, then indeed might a case arise under the Fourteenth Amendment; and this even though the denial was only in the administration of the laws and not in the terms of their texts upon the books.

But the deprivation would consist, not in the acts themselves, but in the sanction or condonation of those acts by state courts, agencies or other officials whose activities would amount to a bestowal upon the original torts of at least the color of state approval.

The defendants submit that it was never the intent of Congress that the Civil Rights Acts should open the doors of the federal courts to every plaintiff who has suffered a tort at the hands of a public officer, even though the latter may have pretended to some legal authority in committing the tort.

On the contrary, the Civil Rights Acts were passed to protect the members of the negro race from deprivation of their rights on account of race, color or previous condition of servitude, either by the state or by individuals. Admittedly, when either a public or a private act is done in violation of this purpose, an action will lie. **But when the occasion for the tort is race or color, no question of denial by a state of due process or equal protection under the Fourteenth Amendment is involved.**

The sections relied upon by the plaintiff are set forth in the margin.*

It is evident from a mere reading of the text of these provisions that they prohibit and provide a remedy for two very distinct classes of wrongs: *first*, wrongs whereby any person is denied the rights of white persons, and *second*, wrongs whereby any person is denied constitutional rights, privileges or immunities.

Any attempt, even by private individuals, to prevent a negro from enjoying the rights of white persons is actionable under this statute.

---

* U. S. C. A. Title 8, Sections 41, 43 and 47 (3):

"§ 41. *Equal rights under the law.*

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other." R. S. § 1977.

"§ 43. *Civil action for deprivation of rights.*

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." R. S. 1979; c. 22, § 1, 17 Stat. 13.

"§ 47 (3). *Conspiracy to interfere with civil rights.*

"*Depriving persons of rights or privileges.*

"(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators." R. S. § 1980; c. 33, 12 Stat. 284; c. 22, § 2, 17 Stat. 13.

Similarly, any deprivation of the rights of any person, white or colored, is actionable under this act, **if the right is constitutional.** But—and this is the essence of the defendants' argument under the present Point—**there is no constitutional right to equal protection or due process of law which is violated unless the act in question be that of the state.**

In other words: When any law, state or federal, guarantees to colored persons the same rights as are guaranteed to white persons, any violation of such law may be actionable. When, however, no question of race is involved and the only law relied on is the Fourteenth Amendment, a case must be made of depsivation under that amendment: *and that amendment requires state action.*

THE AUTHORITY OF BARNEY VS. CITY OF NEW YORK. 193 U. S. 430.

The Circuit Court of Appeals relies upon and the plaintiff disputes the authority of the *Barney case* to support the opinion now under review. The defendants' attitude toward the applicability of this case to the case at bar may be stated as follows:

If the *Barney case* is not to be overruled, it is decisive of the instant case; for it directly holds that acts prohibited by a state statute cannot constitute state action unless it be shown that the state's courts or law enforcing officials will not enforce the statute. In the instant case, the plaintiff does not even intimate that the state courts will not afford him redress.

If, however, it be conceded (for the sake of argument only) that the *Barney case* was wrongly decided, that concession does not aid the plaintiff for this significant reason: In the *Barney case*, the plaintiff sought an injunction to restrain the expropriation of his property for public use. It is true that the expropriation who wholly un-

authorized. In fact, it was forbidden; and for that reason, this court denied relief. But even had the court held the contrary and granted the injunction, the relief granted would have restrained the acquiring of property for the state, even though the acquisition had been by contractors and the City's engineering department.

Such a holding would not have implied a decision that the defendant contractors and the city's engineers were liable to an action under the Civil Rights Statute.

None of the cases cited by the plaintiff indicates that the narrow holding of the *Barney case* has been retracted.

In the *Barney case* itself, this court recognized that where there is a measure of discretion to fix taxes or rates, an abuse of that discretion may be the "act of the state", even though a statute or the State constitution prohibits such abuse of discretion. The court said in the *Barney case* at page 440:

> "And so in *Regan* v. *Farmers' Loan and Trust Co.*, 154 U. S. 362, the general assembly of Texas had established a railroad commission and given it authority to fix reasonable rates, with discretion as to what rates were reasonable.
>
> And as the establishment of rates by the commission was establishment of rates by the State itself, and as the determination was left to the discretion of the commission, their action could not be regarded as unauthorized, even though they may have exercised their discretion unfairly."

This is really all that was held in this court's decisions which the plaintiff cites as repudiating the teaching of the *Barney case*. *Des Moines* v. *Des Moines City Railway Co.*, 214 U. S. 179; *Home Telephone Co.* v. *Los Angeles*, 227 U. S. 278.

The case of *Classic* v. *United States*, 313 U. S. 299, is not in point. That case held that it is a federal offense to

interfere corruptly with a federal election. The court does not decide that there was any violation of the Fourteenth Amendment. On the contrary, the court holds that the rights involved were guaranteed by Section 2 of Article I of the constitution. No such question is presented here.

II.

The complaint fails to state a cause of action under the civil rights act because:

(1) The right of candidacy for nomination at a primary election is not a civil right either apart from or under the constitution of the United States; and

(2) The official proclamation of the plaintiff's failure to achieve nomination, such proclamation being made by the defendants as public officers, is conclusive and cannot be collaterally attacked.

Notwithstanding the gravity of the charges made against the defendants in plaintiff's complaint, the position of the defendants filing this brief can be stated briefly and argued simply.

The present defendants maintain, *first*, that the right to candidacy for nomination at a primary election is not in its nature a civil right, either at common law or within the contemplation of the constitution of the United States; and *second*, that the official pronouncement of the defendants declaring the plaintiff to have been defeated in his candidacy for nomination is—and, if the political and civic procedure of the state is to afford stability of government, necessarily must be—conclusive, so that such pronouncements are not subject to collateral attack.

(i)

The right of candidacy for nomination at a primary election is not a civil right either apart from or under the constitution of the United States.

That nomination to candidacy for public office does not sound in civil rights is clear, not only from the authorities hereafter cited, but upon contemplation of the most fundamental and elementary considerations of the nature and theory of government. Before noting the authorities recognizing and giving effect in the form of judicial precedent to these principles, let us consider the principles themselves.

Public offices are created, not for the benefit of those who achieve incumbency in them, but for the advancement and protection of the public. The social end subserved by representative government is the right of the people to be represented—not the right of any individual, for his own sake, to represent the people. It is true that one who has not only been *duly and fully elected* but *actually installed* in public office must necessarily be compensated by salary or fees for the service which he renders to the public; but even the payment of emolument to the holder of an office is primarily necessary, not in justice to him as an individual, but because without such emolument only the wealthiest of citizens could accept the trust reposed in them by the office. Therefore, both in justice to the individual and for the preservation of government, a public officer who has been elected, *has taken office, and has actually rendered service*, acquires rights measured in money for which an action will lie.

But, as we see from the authorities hereafter cited, the law does not recognize a right even in one who has been not merely nominated, but *duly and fully elected* to an office and who has been illegally denied access thereto by a false

election return to contest the election in virtue of any legal right in himself as the person actually elected. On the contrary, the legal theory of election contest is that *any* voter as a citizen has a right to insist in the courts that the people be represented by those actually elected; and that where a candidate can maintain an election contest at all, he does so *in virtue of his character as a voter* or elector, for the benefit of the public, and *not* because he was in fact elected and has been deprived of a civil right to the office; and apart from statutes, there is no right whatever to contest an election. *Donovan* v. *Comerford*, 332 Ill. 230; *Harding* v. *Gilbert*, 373 Ill. 94; and many cases there cited.

Similarly, it is axiomatic that one who has been elected to an office cannot recover the salary therefor if he has been illegally excluded from office and if the duties appertaining to the office have been discharged by a *de facto* incumbent, even though the occupant of the office is a mere intruder. *McKinley* v. *Chicago*, 369 Ill. 268.

Thus it is clear that although public office is in fact so greatly desired by many men that they will invest their private fortunes and passionate energies in seeking it, nevertheless the law does not recognize the right to such office as in any sense an individual, private, or personal right, and therefore the right to induction in public office is neither "liberty" nor "property" within the purview of the Fourteenth Amendment or civil rights acts.

Since the law does not even *recognize* any right in the individual to an office in which he has not actually been inducted, except such rights as may be enforced for and on behalf of all of the people in an action brought by the people or an elector, and since no such right even exists, *a fortiori* no such right is guaranteed or protected by the constitution of the United States or any statute enacted thereunder.

Let us now turn to the authorities recognizing these capital principles of law and social theory in contexts of circumstances more specifically and incisively applicable to the case at bar.

The teaching of the case of *Taylor* v. *Beckham*, 178 U. S. 548, 44 L. Ed. 1187, cited and discussed by counsel for the Horner executors, is cogent in its application to the case at bar. In that case it was held that those whose right to public office had been denied by the duly constituted authority of the state (in that case the state legislature) had no federal constitutional right to impeach such adverse determination. This case is thoroughly considered in the brief of the Horner executors; counsel's discussion is excellent and their quotations from the opinion are full. We shall therefore not repeat the substance of the discussion, but emphasize here that, as appears from the excerpts quoted in the brief of the Horner executors, the court held that the rights to public office accruing by virtue of an election are not impressed with federal constitutional guaranty. (We shall again briefly cite this case under the following subpoint on account of its holding that official proclamations in election matters are conclusive and cannot be the subject of collateral inquiry in independent proceedings.)

Another case which is apposite to the case at bar is the case of *Blackman* v. *Stone*, 17 Fed. Supp. 102, affirmed by the Circuit Court of Appeals on grounds not pertinent here in 101 F. (2) 500. Of course, that case is not authority here, but we cite and consider it because its reasoning is incisively applicable to the instant case. Appellant, doubtless appreciating and seeking to minimize the force of the District Court's decision as applied to the case at bar, actually cited this case at page 20 of his brief in the lower court.

That case was a suit in the District Court for the Southern District of Illinois and was entertained by a three-

judge court composed of Judges Evans, Barnes and Major. In that case the plaintiffs, members of the Communist party, brought a suit in equity to restrain various county clerks from printing ballots for the election of November 3, 1936, without including thereon the names of candidates designated in a petition for nomination of members of the Communist party. The defendants moved to dismiss the suit on two grounds; *first*, that the rights sought to be vindicated were

"political rather than civil rights;"

and *second*, a ground not relevant here, that equity will not intervene in political matters. The opinion is ably and carefully written. It affords a studious consideration of the discrimination, inherent and fundamental in legal principles and political theory, between political rights and civil rights. The court said at page 107:

> "The dictionaries and text writers who have attempted to define civil rights and distinguish them from political rights have not always succeeded in accentuating the line of demarcation. Nevertheless, definitions from leading authorities like Blackstone are helpful. Bouvier says, basing his distinctions on Blackstone,
>
> " '*Political rights* consist in the power to participate, directly or indirectly, in the establishment or management of government. These political rights are fixed by the constitution. Every citizen has the right of voting for public officers, and of being elected; these are the political rights which the humblest citizen possesses.
>
> " '*Civil rights* are those which have no relation to the establishment, support, or management of the government. These consist in the power of acquiring and enjoying property, of exercising the paternal and marital powers, and the like. It will be observed that every one, unless deprived of them by a sentence of civil death, is in the enjoyment of his civil rights,—**which is not the case with political rights**; for an alien, for example, has no political, although in the full enjoyment of his civil, rights. 1 Bla. Com. 124-139.' "

After extensively considering the question, the court sums up its conclusion that the right of an aspirant for public office is not a civil right in the following language at page 110:

> "Our search for authorities outside of the briefs has not been productive of a single case which supports either of the two contentions which plaintiffs must maintain: (a) that a court of equity will act where political rights only are involved, or (b) that the right to vote or the right to have a name printed on the ballot is a civil right."

The Circuit Court of Appeals affirmed the District Court. However, affirmance was predicated upon the court's view that the complaint failed to show that in fact the plaintiffs were entitled to a place on the ballot.

In view of the well-written brief filed by counsel for the Horner executors, we shall not further protract our argument on this point.

(ii)

The official proclamation of the plaintiff's failure to achieve nomination, such proclamation being made by the defendants as public officers, is conclusive and cannot be collaterally assailed.

The peace, order and stability of society and governments has required from the earliest days that official pronouncements, declarations and findings of fact must be final and conclusive; and that if the solemn recitals of officials charged by law with the ascertaining of the facts, whether such officials be judges, or those required to canvass petitions or returns in elections, may be assailed collaterally, there can be no certainty and hence no security in law. This is, of course, the principle underlying such doctrines as that of *res judicata*, for of what avail are the contests which precede the pronouncements of judgments if the judgments settle and therefore adjudge nothing?

The statutes of Illinois reposed in the present defendants and the deceased Governor Horner the duty of declaring whether the plaintiff had actually received the highest

number of votes. To hold that public officials who perform such duties may be called to account in private actions for damages would be not only to permit the impeachment of official declarations in private litigation, but would be to permit every disgruntled pretender to office to call those charged with the duty of announcing his victory or defeat to account in a civil action sounding in damages against their private estates. No matter how baseless the charge, public officials whose returns should be as conclusive as they are solemn would be called upon to spend their private means in defense of damage suits.

This principle is settled beyond all question by the decision of the Supreme Court of the United States in the case already cited of *Taylor* v. *Beckham*, 178 U. S. 548, 44 L. Ed. 1187. The Supreme Court of the United States said (L. Ed., page 1194):

> "The determination of the result of an election is purely a political question, and if such suits as this may be maintained, the greatest disorder will result in the public business. It has always been the policy of our law to provide a summary process for the settlement of such contests, to the end that public business shall not be interrupted; but if such a suit as this may be maintained, where will such a contest end?"

A wise rule of law provides that a judge who has rendered a corrupt decision may be impeached, may be disbarred as a lawyer, may be imprisoned—but he may not be called upon to defend his judgment, however flagrant his dereliction, in a private suit at the instance of the injured party, for to allow such actions would be to expose every judge to the peril of ruinous litigation for every decision which he made. It is perfectly true that the defendants in the present case were not judicial officers; but the considerations underlying the rule forbidding actions against judges and the principles which should likewise forbid the present action are identical. The defendants were charged by law with the duty of determining a fact of the utmost importance in a democracy—the fact of whether the defendant

was or was not duly nominated as a candidate for public office. To expose them to private litigation whensoever they should execute their duties by making such a determination would be to deter men of responsibility from accepting high public trust attended by the possibility of such ruinous consequences.

The present defendants respectfully adopt the arguments and citations made in the brief of the Horner executors.

CONCLUSION.

In view of the foregoing considerations, we respectfully submit that petitioner is not entitled, under the constitution, to alleged damages resulting from the acts charged, since those acts, being prohibited by statute, were not those of the state of or the defendants in their official capacity so as to come within the purview of the Fourteenth Amendment. We further submit that petitioner is not entitled, under the Civil Rights act, to damages resulting from the acts charged, because the right of candidacy for nomination at a primary election is not a civil right either apart from or under the constitution of the United States; and because the official proclamation of the plaintiff's failure to achieve nomination, such proclamation being made by the defendants as public officers, is conclusive and cannot be collaterally attacked.

We therefore respectfully pray that this Court dismiss the petition for writ of *certiorari*.

Respectfully submitted,

GEORGE F. BARRETT,
Attorney General of the State of Illinois.
Attorney for respondent.

William C. Wines,
Assistant Attorney General,
Of Counsel.

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OPPOSING PETITION FOR CERTIORARI.

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INDEX.

	PAGE
Petitioner was not deprived of any right in violation of the constitution or laws of the United States....	1
The action of the members of the state primary canvassing board was not "state action".....	4
The alleged cause of action against Henry Horner did not survive his death.....	8

List of Authorities Cited.

Bank of Iron Gate v. Brady, 184 U. S. 665; 46 L. ed. 739	9
Barney v. City of New York, 193 U. S. 431.....	7
Brawner v. Irvin (C. C. Ga.), 169 Fed. 964.....	3
Iowa-Des Moines National Bank v. Bennett, 284 U. S. 239; 76 L. ed. 265.....	7
Madden v. Kentucky, 309 U. S. 83; 84 L. ed. 590.....	3
Mitchell v. Greenough (C. C. A. 9), 100 F. 2d 184.....	3
Patton v. Brady, 184 U. S. 608; 46 L. ed. 713.....	9
Schreiber v. Sharpless, 110 U. S. 76; 28 L. ed. 65.....	9
Taylor v. Beckham, 178 U. S. 548; 44 L. ed. 1187.....	3
Twining v. New Jersey, 211 U. S. 78; 53 L. ed. 97.....	3
U. S. v. Bathgate, 246 U. S. 220; 62 L. ed. 676.....	3
U. S. v. Classic, 313 U. S. 299; 85 L. ed. 1368.....	6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 991

JOSEPH E. SNOWDEN,

petitioner,

vs.

EDWARD J. HUGHES, LOUIE E. LEWIS AND ROBERT E. STRAUS, ELI M. STRAUS AND JAMES LEVY, AS CO-EXECUTORS OF THE LAST WILL AND TESTAMENT OF HENRY HORNER, DECEASED,

respondents.

ON PETITION FOR WRIT OF CETIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.*

BRIEF OPPOSING PETITION FOR CERTIORARI.

I.

Petitioner's complaint fails to show that he was deprived of any personal or property right in violation of the constitution and laws of the United States.

All that is alleged in the plaintiff's complaint, essentially, is that in the primary election held April 9, 1940 in the third senatorial district of Illinois the plaintiff was one of several candidates for nomination on the Republi-

* Opinion; 132 F. 2d 476.

can ticket for the office of state representative; that two Republicans were to be nominated; that in the first instance the votes were tabulated by the canvassing board of Cook County, Illinois, and that said board made a return to the secretary of state indicating that Charles J. Jenkins received the highest number of votes among the Republican candidates and petitioner the second highest; that, notwithstanding the return made by the canvassing board of Cook County and published by the secretary of state in a pamphlet purporting to show the official vote cast at the primary election, the members of the state primary canvassing board, contrary to the provisions of the Illinois election laws, wilfully, maliciously and arbitrarily failed to designate plaintiff as one of the Republican nominees for the office of representative in the general assembly from the third senatorial district in Illinois. (R. 2-10.)

Thus, the right said to have been infringed by the members of the state primary canvassing board—assuming the truth of the complaint—was the alleged right of the petitioner to be declared a nominee in an election to be held for members of the Illinois general assembly. Such alleged right, manifestly, is not traceable to the constitution and laws of the United States, but only to the constitution of the laws of the State of Illinois.

Adoption of the 14th amendment to the constitution of the United States did not confer on the federal government general supervisory control over state elections. The alleged erroneous application by the members of the state primary canvassing board of the Illinois election laws, even though characterized as wilful, malicious and arbitrary, did not give rise to a cause of action against the members of the board under the Civil Rights Act. Otherwise every charge by a defeated candidate that the state election officers failed properly to perform their duties would constitute a controversy cognizable under federal

law. The contrary was declared by this court in *Taylor* v. *Beckham*, 178 U. S. 548, 44 L. ed. 1187.

The right to be a candidate to the office of state representative is a right of state citizenship, not of national citizenship. The 14th amendment did not confer upon citizens of the United States any new rights, privileges or immunities. It did not bring within the protection of the national government the great body of civil rights pertaining to state citizenship, but only the special rights incident to national citizenship. (*Twining* v. *New Jersey*, 211 U. S. 78, 92-99; 53 L. ed. 97, 103-106; *Madden* v. *Kentucky*, 309 U. S. 83, 90; 84 L. ed. 590, 594; *United States* v. *Bathgate*, 246 U. S. 220, 226; 62 L. ed. 676, 679.)

Although the plaintiff argues that he was denied "the equal protection of the laws," the complaint points to no legislation by the law-making body of Illinois, nor ruling or action by any agency or officer of the state, applying one rule of law to the plaintiff, as an individual or member of some special class, and a different rule of law to other individuals or classes in like situation. The plaintiff, when he became a candidate for the office of state representative, became subject to the authority and procedure of the state primary canvassing board, not in some special discriminatory way, but only to the same extent and in the same manner as all other candidates. The facts alleged in the complaint, even if true and complete, amount only to a charge that there was denied to the plaintiff a correct and just application of the laws of Illinois, but not that there was denied to him the "equal protection" of the laws. (See *Mitchell* v. *Greenough* (C. C. A. 9), 100 F. 2d 184, cert. den. 306 U. S. 659; *Brawner* v. *Irvin* (C. C. Ga.), 169 Fed. 964.)

Petitioner urges further that he was deprived of "a fundamental liberty" without due process of law, in violation of the 14th amendment. The complaint does not

allege that the statutes of Illinois prescribing the authority to be exercised and the procdure to be followed by the state primary canvassing board are inherently repugnant to the due process guarantee of the 14th amendment; nor that in this particular instance the state canvassing board did not have jurisdiction to canvass the votes and declare the result; nor that in this particular instance the state canvassing board did not follow the prescribed procedure; but only that the result reached by the board in this instance was contrary to the laws of Illinois. The facts alleged in the complaint do not warrant plaintiff's legal conclusion that he was deprived of "a fundamental liberty" without due process of law. If every decision by a state court or administrative board were open to challenge under the 14th amendment, upon the mere assertion that the decision was erroneous and arbitrary and that thereby the defeated party was denied the due process of law and the equal protection of the laws, the obvious result would be to bring within the scope of the Civil Rights Act—and within the original and appellate jurisdiction of the federal courts—every claim that state rights had been violated by the state tribunals or officers. The 14th amendment has no such reach.

II.

The circuit court of appeals properly decided that the action of the members of the state primary canvassing board was not "state action" within the meaning of the 14th amendment.

The complaint of the plaintiff alleges that the members of the state primary canvassing board deliberately disobeyed the state election laws. Undoubtedly this act was an official act, whether lawful or unlawful, but every act of a state officer or administrative agency is not "state action" within the purview of the 14th amendment. The

state action proscribed by the 14th amendment is that which abridges the immunities of citizens of the United States, or deprives a person of life, liberty or property without due process of law, or denies to him the equal protection of the laws. Accordingly, on a complaint that rights protected by the 14th amendment have been violated, there is to be considered: (1) whether the act affects a privilege or right of the kind shielded by the 14th amendment; (2) whether the act complained of, even though done by state officers in course of their official duties, may properly be considered as state action.

It is true, of course, that the state can act only by its officers. But there are many state officers, of many grades, and the state power is divided among them. Every act of a state officer, by virtue of his office, may be in a logical sense an exercise of state power, yet of such minute, tentative or isolated character that it does not amount to a state practice, or a procedural or substantive ruling sanctioned by the state. Therefore, even though it is the act of a public officer or agency, it may be said to constitute individual action rather than state action. A mandate directed to a state, such as the 14th amendment, does not extend to every act of a state officer or agency, but only to such action to which "sufficient state sanction was given * * * to make it the action of the state." And when the state expressly forbids an act by its own legislation, and the plaintiff does not claim that the law has been systematically ignored or evaded, or that it has been discriminatorily applied against a class of which he is a member, the plaintiff is complaining not of action sanctioned by the state but rather the unsanctioned action of individual state officers. Such unsanctioned official action is ordinarily remediable by the state's own processes, administrative or judicial,* but at any rate does not come within the reach of the 14th

* In the case at bar, the complaint does not allege that the plaintiff was without remedy in the state courts, or that if he sought such remedy upon what grounds it was denied.

amendment (and consequently, within the reach of the Civil Rights Act).

The petitioner invokes the decision in *United States* v. *Classic*, 313 U. S. 299, 85 L. ed. 1368, wherein this court reversed the judgment of the district court sustaining a demurrer to an indictment in a prosecution under sections 19 and 20 of the Criminal Code. The defendants were commissioners of election in one of the precincts of New Orleans, Louisiana, and the charge was that they falsely counted the ballots of voters in a primary election held to nominate a candidate for the office of representative in congress and thereby deprived qualified voters of the right to vote and have their ballots counted. This court said (313 U. S. at p. 314, 85 L. ed. at p. 1377):

> "* * * The primary in Louisiana is an integral part of the procedure for the popular choice of Congressman. The right of qualified voters to vote at the congressional primary in Louisiana and to have their ballots counted is thus the right to participate in that choice.
>
> "We come then to the question whether that right is one secured by the constitution. Section 2 of article 1 commands that Congressmen shall be chosen by the people of the several states by electors, the qualifications of which it prescribes. The right of the people to choose, whatever its appropriate constitutional limitations, where in other respects it is defined, and the mode of its exercise is prescribed by state action in conformity to the constitution, is a right established and guaranteed by the constitution and hence is one secured by it to those citizens and inhabitants of the state entitled to exercise the right. * * *
>
> "Obviously included within the right to choose, secured by the constitution, is the right of qualified voters within a state to cast their ballots and have them counted at congressional elections. This court has consistently held that this is a right secured by the constitution. * * * And since the constitution command is without restriction or limitation, the right, un-

like those guaranteed by the fourteenth and fifteenth amendments, is secured against the action of individuals as well as of states."

This court then went on to consider the question whether the right to choose a candidate at a primary election is embraced in the right to choose representatives secured by article 1, § 2, and the majority of the court answered the court in the affirmative.

Petitioner urges (p. 17): "The conduct of the state officers in the instant case was exactly parallel to that of the respondents in the *Classic* case. It follows, therefore, that the decision of the court below in the instant case was inconsistent with the decision of this court in the *Classic* case." The case at bar involves a primary election of candidates for the general assembly of the State of Illinois, not a primary election for candidates for the congress of the United States. The case at bar involves the claim of a defeated candidate that the members of the state primary canvassing board "arbitrarily" denied to him a certificate of nomination, not that qualified voters were denied the right to cast their votes and have them counted. The case at bar involves no claim that the petitioner was deprived of rights secured to him by section 2 of article 1 of the federal constitution, but merely the vague claim that the ruling of the state primary canvassing board of which he complains somehow constituted state action in violation of rights said to be guaranteed to him by the 14th amendment.

It is correctly stated in the opinion of the circuit court of appeals that the holding of this court in *Barney* v. *City of New York*, 193 U. S. 431, although qualified by later decisions, has never been overruled. In the case at bar, as in *Barney* v. *City of New York*, the complaint of the plaintiff relates to a single ruling by state officers, alleged to be erroneous under state law, with nothing more to show state sanction of such ruling. By contrast, in the case of *Iowa-Des Moines National Bank* v. *Bennett*, 284 U. S. 239, 76 L. ed. 265, relied upon by the petitioner, wherein certain

national banking corporations claimed that the taxing officers had for several years exacted from them taxes on their shares of stock at rates higher than those assessed against competing domestic corporations, in contravention both of state law and the equal protection clause of the 14th amendment, it appeared that after years of systematic overassessment of the shares of stock of national banks, the state took no action, despite the protests by the national banks—to bring about equalization of taxes and at the same time insisted upon retaining the benefit of the higher taxes paid by the national banks. As stated by Mr. Justice Brandeis:

> "Here, the exaction complained of was made by the treasurer in the name of and for the state, in the course of performing his regular duties; the money is retained by the state; and the judicial power of the state has been exerted in justifying the retention."

Detailed discussion of other cases cited by petitioner seems unwarranted, either on the question whether petitioner's alleged right to be a candidate for the office of state representative was a right guaranteed by the 14th amendment, or on the question whether the ruling of the members of the state primary canvassing board constituted "state action" within the meaning of the 14th amendment.

The respondents Robert E. Straus, Eli M. Straus and James Levy, co-executors of the last will and testament of Henry Horner, deceased, in their motion to strike the plaintiff's complaint and dismiss the suit, urged as one of the grounds of said motion that it affirmatively appeared from the complaint that the cause of action, if any, which might have existed against Henry Horner during his lifetime, had abated by his death and did not survive against these defendants. (R. 13.) The petition for certiorari ignores this point. There is no provision in the Civil Rights Act for survival of causes of action arising thereunder. Under

the decisions of this court in *Schreiber* v. *Sharpless*, 110 U. S. 76, 28 L. ed. 65, *Patton* v. *Brady*, 184 U. S. 608, 46 L. ed. 713, and *Bank of Iron Gate* v. *Brady*, 184 U. S. 665, 46 L. ed. 739, it is clear that the alleged cause of action against Henry Horner did not survive against the executors of his last will and testament.

The petition for certiorari shows no adequate justification for a review by this court of the judgment rendered by the circuit court of appeals.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 57

JOSEPH E. SNOWDEN,

petitioner,

vs.

EDWARD J. HUGHES, LOUIE E. LEWIS AND ROBERT E. STRAUS, ELI M. STRAUS AND JAMES LEVY, AS CO-EXECUTORS OF THE LAST WILL AND TESTAMENT OF HENRY HORNER, DECEASED,

respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF THE RESPONDENTS ROBERT E. STRAUS, ELI M. STRAUS AND JAMES LEVY, AS CO-EXECUTORS OF THE LAST WILL AND TESTAMENT OF HENRY HORNER, DECEASED.

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INDEX.

	PAGE
Statement of the case	1
Plaintiff's complaint	2
Motion to dismiss	3
Order of district court	4
Opinion of circuit court of appeals	4
Summary of the argument	5
I. A cause of action under the Civil Rights Act does not survive the death of the alleged wrongdoer	5
II. The complaint fails to state a cause of action under Civil Rights Act	6
Argument:	
I. Plaintiff's alleged cause of action, so far as it relates to the conduct of Henry Horner, did not survive his death	8
II. The complaint fails to state a cause of action under the Civil Rights Act	12

LIST OF AUTHORITIES CITED.

Bank of Iron Gate v. Brady, 184 U. S. 665, 46 L. ed. 739 ..... 6, 11

Barnes Coal Corp. v. Retail Coal Merchants Asso. (C. C. A. 4), 128 F. 2d 645, 649 6

Brawner v. Irwin (C. C. Ga.), 169 Fed. 964 7

Carter v. Greenhow, 114 U. S. 317, 5 S. Ct. 928; 29 L. ed. 202 7

Clearfield Trust Co. v. United States, 87 L. ed. 524, 526 5

Deitrick v. Greaney, 309 U. S. 190, 200, 84 L. ed. 694, 701 5

Gerling v. Baltimore & Ohio R. R. Co., 151 U. S. 673, 692, 38 L. ed. 311, 318 8

Knox, Administrator v. City of Sterling, 73 Ill. 214 6

Love v. Chandler (C. C. A. 8), 124 F. 2d 785 7

Madden v. Kentucky, 309 U. S. 83, 90; 84 L. ed. 590, 594 7

Michigan Central R. R. Co. v. Vreeland, 227 U. S. 59, 57, 33 S. Ct. 192, 57 L. ed. 417, 420 6

Mitchell v. Greenough (C. C. A. 9), 100 F. ed. 184; cert. den. 306 U. S. 659, 83 L. ed. 1055 7

Olson v. Scully, 296 Ill. 418, 420, 129 N. E. 841, 842 ..... 6, 11

Patton v. Brady, 184 U. S. 608, 614, 46 L. ed. 713, 717 11

Schreiber v. Sharpless, 110 U. S. 76, 28 L. ed. 65 ..... 5, 9

Selden v. Illinois Trust & Savings Bank, 239 Ill. 67, 77, 87 N. E. 860, 863 ..... 6, 11

Sullivan v. Associated Billposters & Distributors (C. C. A. 2), 6 F. 2d 1000, 1004-1012 ..... 5, 6, 9

Taylor v. Beckham, 178 U. S. 545, 567, 570; 44 L. ed. 1187, 1194, 1198 ..... 6, 7, 12

United States v. Moore (C. C. Ala.), 129 Fed. 630..... 7
Van Choate v. General Electric Co. (D. C. Mass.), 245 Fed. 120, 121 .....6, 11
Walsh v. New York, New Haven & Hartford R. R. Co. (C. C. Mass.), 173 Fed. 494; affd. 223 U. S. 1, 56 L. ed. 327 .....5, 10
Wilcox v. Bierd, 330 Ill. 571, 583, 585, 162 N. E. 170, 176 .....6, 11

STATUTES CITED.

Illinois Revised Statutes 1939, ch. 46, §§ 426 and 456... 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

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JOSEPH E. SNOWDEN,

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vs.

EDWARD J. HUGHES, LOUIE E. LEWIS AND ROBERT E. STRAUS, ELI M. STRAUS AND JAMES LEVY, AS CO-EXECUTORS OF THE LAST WILL AND TESTAMENT OF HENRY HORNER, DECEASED,

respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF THE RESPONDENTS ROBERT E. STRAUS, ELI M. STRAUS AND JAMES LEVY, AS CO-EXECUTORS OF THE LAST WILL AND TESTAMENT OF HENRY HORNER, DECEASED.

Statement of the case.

This case is here on writ of certiorari granted June 7, 1943, to review the judgment of the Circuit Court of Appeals for the Seventh Circuit (opinion reported, 132 F. 2d 476).

The plaintiff (petitioner) filed a complaint for damages in the district court under the Civil Rights Act of April

20, 1871. (R. 2-10.) Three separate motions were filed to dismiss the plaintiff's complaint, one by the defendant Edward J. Hughes (R. 10-11), one by the defendant Louie E. Lewis (R. 15-16), and one by the defendants Robert E. Straus, Eli M. Straus and James Levy, as co-executors of the last will and testament of Henry Horner, deceased (R. 12-14). Orders were entered by the district court sustaining said motions generally (R. 14, 17-18), not solely "for lack of jurisdiction," as erroneously noted by the reporter (132 F. 2d 476).

Plaintiff's complaint.

The plaintiff's complaint is highly artificial. The plaintiff says that on April 9, 1940 a primary election was to be held in the third senatorial district of Illinois to nominate candidates for the office of representative in the general assembly of Illinois; that three representatives were to be elected from the third senatorial district; that the Democratic Senatorial Committee for the third district, by proper resolution (adopted pursuant to statute) decided that only one candidate was to be chosen to run on the Democratic ticket; that the Republican Senatorial Committee for the third district resolved that two candidates should be chosen to run on the Republican ticket; that the canvass of votes cast, as returned by the Board of Election Commissioners of Cook County to the Secretary of State and as published by the latter, showed that the top Democratic candidate received 30,009 votes, the top Republican candidate (Jenkins) 12,781½ votes, the second Republican candidate (Snowden) 3,375½ votes. (R. 6-7.)

It is not alleged directly, anywhere in the complaint, that the canvass of votes as returned by the Board of Election Commissioners of Cook County and as published by the Secretary of State *was a true and complete statement of all the votes actually cast at the primary for candidates for the office of representative.* In truth, as stated by plain-

tiff's counsel in response to questions propounded by the justices of the circuit court of appeals, there was another Republican candidate who received more votes than plaintiff, but whose votes were not shown in the return made by the canvassing board because he was then dead.

The complaint thereupon charges that the members of the State Primary Canvassing Board of Illinois, namely, Henry Horner (governor), Edward J. Hughes (secretary of state) and Louie E. Lewis (state treasurer), "wilfully, maliciously and arbitrarily" refused to issue an official proclamation designating the plaintiff as one of the nominees of the Republican party for the office of representative, but instead issued a proclamation designating only one nominee for each party. (R. 7-8.) Here, again, the complaint stops short and does not allege that at the election there was in fact only one Republican candidate instead of two; or, if in fact there were two Republican candidates, in what manner the second Republican candidate was nominated.

Motion to dismiss.

The motion to dismiss plaintiff's complaint filed by the defendants Robert E. Straus, Eli M. Straus and James Levy, executors, was based upon three separate grounds: (1) that the complaint failed to state facts sufficient to indicate a claim upon which relief could be granted; (2) that it affirmatively appeared from the complaint that the district court had no jurisdiction of the subject matter; (3) that it affirmatively appeared from the complaint that the cause of action, if any, which might have existed against Henry Horner during his lifetime, had abated by his death and did not survive against his executors.

Order of district court.

As already stated, the order of the district court was a general order of dismissal, not limited to lack of jurisdiction. (R. 14.)

Opinion of circuit court of appeals.

The opinion of the circuit court of appeals, because it disposed of the case on other grounds, made no mention of the point urged by these respondents that the cause of action, if any, which might have been asserted against Henry Horner during his lifetime, had abated by his death and did not survive against his executors.

The petition for certiorari and brief in support thereof ignore this contention. The point was mentioned briefly, with citation of three decisions of this court, in the brief of these respondents opposing the petition for certiorari. No additional brief has since been filed on behalf of the petitioner. The primary purpose of the present brief is to amplify the proposition that the plaintiff's complaint states no cause of action against these respondents, as executors, by reason of the alleged wrongful conduct of the late Henry Horner.

Summary of the argument.

I.

A cause of action under the Civil Rights Act does not survive the death of the alleged wrongdoer.

(A) Neither the Civil Rights Act itself, nor any other federal statute, provides for the survival of a cause of action arising under the Civil Rights Act.

Civil Rights Act:—8 U. S. C. A. §§ 43 and 47; R. S. §§ 1979 and 1980.

(B) When a cause of action is given by a federal statute not itself containing any provision for survival of the action, the question of survival is to be determined in accordance with the common law.

Schreiber v. *Sharpless*, 110 U. S. 76, 28 L. ed. 65.

Walsh v. *New York, New Haven & Hartford R. R. Co.* (C. C. Mass.), 173 Fed. 494, 495; affd. 223 U. S. 1, 56 L. ed. 327.

Sullivan v. *Associated Billposters & Distributors* (C. C. A. 2), 6 F. 2d 1000, 1004.

See also:

Deitrick v. *Greaney*, 309 U. S. 190, 200, 84 L. ed. 694, 701.

Clearfield Trust Co. v. *United States*, 87 L. ed. 524, 526.

(C) At common law, in an action sounding in tort, there was no survival of the cause of action against the representatives of the alleged wrongdoer unless the deceased increased his own estate by means of the alleged wrongful act.

Walsh v. *New York, New Haven & Hartford R. R. Co.* (C. C. Mass.), 173 Fed. 494, 495; affd. 223 U. S. 1, 56 L. ed. 327.

Michigan Central R. R. Co. v. *Vreeland*, 227 U. S. 59, 67, 33 S. Ct. 192, 57 L. ed. 417, 420.

Bank of Iron Gate v. *Brady*, 184 U. S. 665, 46 L. ed. 739.

Sullivan v. *Associated Billposters & Distributors* (C. C. A. 2), 6 F. 2d 1000, 1004-1012.

Van Choate v. *General Electric Co.* (D. C. Mass.), 245 Fed. 120, 121.

Barnes Coal Corp. v. *Retail Coal Merchants Asso.* (C. C. A. 4), 128 F. 2d 645, 649.

Knox, Administrator v. *City of Sterling*, 73 Ill. 214.

Wilcox v. *Bierd*, 330 Ill. 571, 583, 585, 162 N. E. 170, 175, 176.

Selden v. *Illinois Trust & Savings Bank*, 239 Ill. 67, 77, 87 N. E. 860, 863.

Olson v. *Scully*, 296 Ill. 418, 420, 129 N. E. 841, 842.

II.

The complaint fails to state a cause of action under the Civil Rights Act.

(A) Assuming, on the motion to dismiss plaintiff's complaint, that when the members of the State Primary Canvassing Board omitted the name of the plaintiff as nominee for the office of state representative they misconstrued or misapplied the election laws of Illinois, such decision and action did not violate any right of the plaintiff protected by the 14th amendment.

Taylor v. *Beckham*, 178 U. S. 545, 567, 570; 44 L. ed. 1187, 1194, 1198.

(B) The right or privilege of the plaintiff to be a candidate for the office of state representative was a right or privilege of state citizenship, dependent solely upon state

law; not a right, privilege, or attribute of national citizenship, specially protected by the 14th amendment.

Carter v. *Greenhow*, 114 U. S. 317, 5 S. Ct. 928; 29 L. ed. 202.

Madden v. *Kentucky*, 309 U. S. 83, 90; 84 L. ed. 590, 594.

Love v. *Chandler* (C. C. A. 8), 124 F. 2d 785 (and the cases therein cited).

Brawner v. *Irvin* (C. C. Ga.), 169 Fed. 964.

United States v. *Moore* (C. C. Ala.), 129 Fed. 630.

(C) Plaintiff's complaint, tested by its averments of facts and ignoring its conclusions, does not show or tend to show that the members of the State Primary Canvassing Board caused the state of Illinois to deny to the plaintiff "the equal protection of the laws," but only that the members of the board made an erroneous decision in the particular case.

Mitchell v. *Greenough* (C. C. A. 9), 100 F. 2d 184; cert. den. 306 U. S. 659, 83 L. ed. 1055.

(D) The facts alleged in plaintiff's complaint do not show or tend to show that the members of the State Primary Canvassing Board caused the state of Illinois to deprive the plaintiff of life, liberty or property without "due process of law."

Taylor v. *Beckham*, 178 U. S. 545, 44 L. ed. 1187.

ARGUMENT.

I.

Plaintiff's alleged cause of action, so far as it relates to the conduct of Henry Horner, did not survive Horner's death.

The plaintiff did not file a suit until after the death of Henry Horner. The plaintiff claims that he was "injured in his property" by alleged wrongful deprivation of the opportunity to be a candidate for election as a representative in the general assembly of Illinois; but not that the members of the State Primary Canvassing Board of Illinois, consisting in 1940 of the governor, the late Henry Horner, the secretary of state, Edward J. Hughes, and the state treasurer, Louie E. Lewis, of whose decision he complains, in any manner appropriated to themselves any of his property.

The Civil Rights Act contains no provision for survival of any cause of action arising thereunder. There is no general federal statute governing survival of actions.* The result is that on a claim arising from a federal statute, where the statute itself makes no provision for survival, the question whether the cause of action survives the death of the alleged wrongdoer must be decided in accordance with the common law.

* Rule 25 of the Code of Civil Procedure for the federal district courts provides that "if a party dies and the claim is not thereby extinguished, the court within two years after the death may order substitution of the proper authorities." Rule 25 is applicable only to an action pending at the time of the death and does not of itself undertake to specify when the claim is extinguished by the death and when not extinguished. (*Gerling* v. *Baltimore & Ohio R. R. Co.*, 151 U. S. 673, 692, 38 L. ed. 311, 318.)

The Illinois statutes on abatement or survival of actions can have no bearing on a suit to recover damages under the federal Civil Rights Act.

In *Schreiber* v. *Sharpless*, 110 U. S. 76, 28 L. ed. 65, suit was instituted in the federal district court to recover penalties imposed by an act of congress for infringement of a copyright. Upon the death of the defendant Sharpless, before judgment, the plaintiffs sued out a *scire facias* against the executors of the will of Sharpless requiring them to appear and become parties to the action, or show cause why they should not be made parties by order of the court. A motion to quash the writ was granted. Thereupon the plaintiffs applied to this court for a writ of mandamus requiring the district court to reinstate the writ of *scire facias* and this application was denied. This court said:

> "* * * The right to proceed against the representatives of a deceased person depends not on forms and modes of proceeding in a suit, but on the nature of the cause of action for which the suit is brought. * * * Whether an action survives, depends on the substance of the cause of action, not on the forms of proceeding to enforce it. As the nature of penalties and forfeitures imposed by act of congress cannot be changed by state laws, it follows that state statutes allowing suits on state penal statutes to be prosecured after the death of the offender, can have no effect on suits in the courts of the United States for the recovery of penalties imposed by an act of congress."

From the learned opinion of Mr. Justice Rogers in *Sullivan* v. *Associated Billposters & Distributors* (C. C. A. 2), 6 F. 2d 1000, devoted to a comprehensive discussion of the question whether a cause of action under the Sherman Anti-trust Act could be prosecuted against the executors of a deceased defendant, we quote the following (p. 1004):

> "* * * While the statutes of the United States prescribe the methods for reviving actions which survive, they do not prescribe what causes of action shall sur-

vive. The language of the statute above set forth is, 'in case the cause of action survives by law,' the executor or administrator may prosecute or defend, etc.; and as there is no other federal statute on the subject the question naturally arises what is meant by the phrase 'by law' in the connection in which it is used. It does not refer to state law; for the statutes of a state are plainly without application to cases which originate under an act of congress. A cause of action which is given by a federal statute, if no specific provision is made by act of congress for its survival, survives or not according to the principles of the common law."

The case of *Walsh* v. *New York, New Haven & Hartford R. R. Co.* (C. C. Mass.), 173 Fed. 494, affd. 223 U. S. 1, 56 L. ed. 327, was a suit under the federal employers' liability act. The injured employee had died and his administratrix brought suit seeking to recover, among other things, for the conscious suffering of the employee prior to his death. The defendant demurred to this part of the declaration, contending that the cause of action which the employee had during his lifetime to recover for conscious suffering did not survive to his administratrix. The court sustained the demurrer:

"As the cause of action is given by a federal statute, this court cannot have recourse to a state statute in order to determine whether the cause of action survives or not * * *. This section [28 U. S. C. A. 778] does not itself provide what causes of action shall survive, but, in the absence of other controlling statute, leaves the matter to the common law. In the case at bar, therefore, the state statutes are inapplicable, there is no general federal statute, and the particular statute in question * * * says nothing about survival.

"Thus remitted to the common law, at which survival is out of the question, we must here hold that the cause of action did not survive * * *."

It is a well settled rule in Illinois that a cause of action created by statute does not survive unless declared so to do by the statute itself, or unless provision for its survival

is made by some other statute. (*Wilcox* v. *Bierd*, 330 Ill. 571, 583, 585, 162 N. E. 170, 176; *Olson* v. *Scully*, 296 Ill. 418, 424; *Selden* v. *Illinois Trust & Savings Bank*, 239 Ill. 67, 77.) Manifestly, under this rule, no statute of Illinois could have any bearing upon a cause of action created by an act of congress.

To state the applicable rule of common law presents no difficulty. In an action *ex delicto*, the common law rule was that if a party increased his own estate by wrongfully taking another's property, an action for such injury would survive his death and might be prosecuted against his personal representative; but not if the decedent had received no benefit and had not increased his estate by means of the wrongful act. (*Bank of Iron Gate* v. *Brady*, 184 U. S. 665, 46 L. ed. 739; see also *Patton* v. *Brady*, 184 U. S. 608, 614, 46 L. ed. 713, 717.)

As stated in *Van Choate* v. *General Electric Co.* (D. C. Mass.), 245 Fed. 120, 121:

> "* * * In causes of action which arise solely under the laws of the United States, survivorship is determined according to the principles of the common law. *Schreiber* v. *Sharpless*, 110 U. S. 76, 3 Sup. Ct. 423, 28 L. ed. 65. At common law, actions *ex delicto* did not survive, except in a few instances, in which the injured party had the right to waive the tort, and sue in assumpsit. *Patton* v. *Brady, Ex'x*, 184 U. S. 608, 614, 22 Sup. Ct. 493, 46 L. ed. 713; *Phillips* v. *Homfray*, 24 Ch. D. 439; *U. S.* v. *Daniels*, 6 How. 11, 12 L. ed. 323. Actions for mere injuries not resulting in profit to the wrongdoer did not survive either his death or that of the injured party. *Henshaw* v. *Miller*, 17 How. 212, 219, 222, 15 L. ed. 222."

Since it is apparent on the face of plaintiff's complaint that the alleged tortious conduct of the decedent, Henry Horner, did not result in a profit or unjust enrichment, for which the injured party had the right to bring an action of indebitatus assumpsit, the judgment dismissing plaintiff's complaint as against these respondents should be affirmed.

II.

The complaint fails to state a cause of action under the Civil Rights Act.

Due process of law in the determination of the result of a primary election is not denied by vesting the power to make such determination *ad limina* in a quasi-judicial board consisting of the governor, state secretary and state treasurer. (*Taylor* v. *Beckman*, 178 U. S. 545, 44 L. ed. 1187.) Plaintiff's complaint says nothing at all about the procedure followed by the State Primary Canvassing Board, but merely condemns the ruling made by the board with respect to his candidacy. In the petitioner's brief, at page 29, there is interpolated the statement that the ruling of the board was made "without any opportunity to petitioner to be heard in the matter." No such allegation appears in the complaint, nor any allegation that the plaintiff had no recourse to the state court, or that the remedy if any afforded by the state laws was inherently inadequate. For all that appears in the complaint, there is no basis whatever for petitioner's suggestion in his brief that he was not afforded opportunity to be heard, or that he did not in fact obtain a hearing by the state officers, administrative and judicial, entrusted by the state laws with the duty to pass upon plaintiff's claim.*

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* The ruling made by the canvassing board was subject to review by the circuit court, with assurance of prompt hearing, as follows:

§ 62 of Act of July 6, 1927 (L. 1927, p. 459), as amended June 28, 1935 (L. 1935, p. 803); Ill. Rev. Stats. 1939, ch. 46, § 426:

"Any candidate whose name appears upon the primary ballot of any political party in any precinct may contest the election of the candidates nominated by his political party, upon the face of the returns, if he so desires, and may, in said county or any of the precincts thereof as to the office for which he was a candidate, contest the election in such county or precinct by filing

If plaintiff's suit were held to be maintainable, then state election contests could be indirectly shifted to the federal courts, in form of suits for damages, upon the mere allegation that the state officers who decided the contest (or canvassed the votes) adversely to the contestant acted pursuant to a conspiracy to deprive him of rights protected by the federal constitution; or, by the free use of adverbs, charging that the state officers acted "wilfully, maliciously and arbitrarily." Such allegations, as made in the com-

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with the clerk of the county court, except in the case of candidates for the nomination for state and congressional offices and for the office of county judge, a petition in writing, setting forth the grounds of contest, which petition shall be verified by the affidavit of the petitioner or other person, and which petition shall be filed within five (5) days after the completion of the canvass of the returns. The contestant shall also file with the canvassing board, which canvasses the returns for such nomination (and if for the nomination for an office, certified tabulated statements of the returns of which are to be filed with the secretary of state), also with the county canvassing board, a notice of the pendency of the contest. In the case of a contest for the nomination for state and congressional offices and for the office of county judge, said petition shall be filed in the office of the clerk of the circuit court.

"Authority and jurisdiction are hereby vested in the county court or in the judge thereof in vacation, or in the circuit court or in the judges thereof in vacation, as the case may be, to hear and determine primary contests. When a petition to contest a primary shall be filed in the office of the clerk of the court, said petition shall forthwith be presented to the judge thereof, who shall note thereon the date of the presentation, and shall note thereon the day when he will hear the same, which shall not be more than five (5) days thereafter, and shall order issuance of summons to each defendant named in the petition.

"Summons shall forthwith issue to each defendant named in the petition and shall be served in the same manner as is provided in other civil cases. Summons may be issued and served in any county in the state. The case may be heard and determined by the county

plaint here under consideration, do not change the true nature of the complaint, namely, to obtain a decision that the election contest (or canvass of votes) was erroneously decided by the state officers and to subject the officers who made the decision to the penalty of a judgment for damages.

* * * * *

In view of the argument already made in the brief of these respondents opposing the petition for certiorari (point

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or circuit court in term time, or by the judges thereof in vacation, at any time not less than three (3) days after service of process, and shall have preference in the order of hearing to all other cases. The petitioner shall give security for all costs.

"If, in the opinion of the court, in which the petition is filed, the grounds for contest alleged are insufficient in law the petition shall be dismissed. If the grounds alleged are sufficient in law, the court shall proceed in a summary manner and may hear evidence, examine the returns, recount the ballots and make such orders and enter such judgment as justice may require. The court shall ascertain and declare by a decree, as in equity to be entered of record in the proper court, the result of such election in the territorial area for which the contest is made. The judgment of the court shall be final. A certified copy of said decree shall forthwith be made by the clerk of the court and transmitted to the board canvassing the returns for such office, and in case of contest, if for nomination for an office, tabulated statements of returns for which are filed with the secretary of state, also in the office of the county clerk in the proper county. The proper canvassing board, or boards, as the case may be, shall correct the returns or the tabulated statement of returns in accordance with said decree."

See also § 13 of an act in relation to the nomination of members of the general assembly by political parties, and the election of senatorial committeemen, approved July 6, 1927 (L. 1927, p. 1942), as amended by act approved February 15, 1933 (L. 1933, p. 563); Ill. Rev. Stats. 1939, ch. 46, § 456; whereby the provisions of the act above quoted are made specifically applicable to primary elections for nomination of candidates for the general assembly.

I thereof), we deem it unnecessary to comment further on the propositions and authorities set forth in part II of the foregoing "summary of the argument."

Respectfully submitted,

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counsel for said respondents.

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FILE COPY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1943

No. 57

JOSEPH E. SNOWDEN,

Petitioner,

vs.

EDWARD J. HUGHES, LOUIE E. LEWIS AND ROBERT E. STRAUS, ELI M. STRAUS AND JAMES LEVY, AS CO-EXECUTORS OF THE LAST WILL AND TESTAMENT OF HENRY HORNER, DECEASED,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR A RECONSIDERATION OR REHEARING.

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List of Authorities.

	PAGE
Bank v. Okely, 4 Wheat. 244	8
Carter v. Com., 14 Cal. 2d 179, 182, 93 Pac 2nd 140, 142	14
Cave v. Newell, 246 U.S. 650	6, 13
DeLoach, et al. v. Crowley's, Inc., 128 F. 2d 378, 380	12
Fletcher v. Tuttle, 151 Ill. 41-53, 37 N.E. 945-946	14
Flood v. State, 100 Fla. 70, 78; 129 So. 861	14
Gillespie v. People, 188 Ill. 176, 182	14
Hitchcock v. Reynolds, 278 Ill. App. 559, 562, 563	11
Ickes v. Fox, et al., 300 U.S. 82, 96	12
In re Remmler, 136 U.S. 436, 448	5
Josma v. Western, 249 Ill. 508, 514; 94 N.E. 945, 946	14
Joyner v. Browning, 30 F. Supp. 512, 517	14
Mandley v. Backer, 121 F. 2d 875, 876	15
Seimer v. State Mut., et al., 108 F. 2d 302, 306	12, 16
Selective Draft Law Cases, 245 U.S. 366, 389	4, 5, 6
Smith v. Texas, 311 U.S. 128, 130	15
State v. Lollis, 326 Mo. 644, 649	14
Taylor v. Beckham, 178 U.S. 548, 579, 592, 602	6, 7, 13
Taylor v. Nealon, 120 S.W. 2d 586, 588	14
Tindal v. Wesley, 167 U.S. 204, 217	15
Wilson v. N. C., 169 U.S. 586, 596	13

Const. and Statutes.

Ill. Const., Art. VII, Par. 6	3, 4
U. S. Const., 14th Amend.	4, 5
Ill. Rev. Stats., 1941, Chap. 110, Sec. 166, Subsec. 2	10
Ill. Rev. Stat., 1941, Chap. 110, Sec. 169	11
28 U.S.C.A. fol. Sec. 723c, Rule 12	12

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To the Honorable Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Comes now the petitioner herein, respondent and appellant below, and presents this petition for a reconsideration or rehearing, and for the vacating of a judgment affirming in written opinion and decision the judgment of the lower Court.

Jurisdiction.

On the 17th day of January, 1944, the opinion of the Court was entered. The Honorable Chief Justice rendered the opinion of the Court which affirmed the judgment of the lower court with the following declaration in the case of *Joseph E. Snowden, Petitioner*, v. *Edward J. Hughes, Louie E. Lewis and Robert E. Straus, et al. etc.*, No. 57, October Term, 1943:

> "The judgment is accordingly affirmed for failure of the complaint to state a cause of action within the jurisdiction of the District Court."

Mr. Justice Frankfurter specially concurred with the opinion of the Chief Justice.

Mr. Justice Douglas, with whom Mr. Justice Murphy concurred, entered a dissent to the opinion of the Chief Justice; and Mr. Justice Douglas stated as follows:

> "But I depart from the majority when it denies Snowden the opportunity of showing that he was in fact the victim of such discriminatory action. His complaint seems to me to be adequate to raise the issue. He charges a conspiracy to wilfully, maliciously and arbitrarily refuse to designate him as one of the nominees of the Republican Party, that such action was an 'unequal' administration of the Illinois law and a denial to him of the equal protection of the laws, and that the conspiracy had that purpose. While the complaint could have drawn the issue more sharply, I think it defines it sufficiently to survive the motion to dismiss."

This peitition for a reconsideration or rehearing is filed within an extension of time granted by this Honorable Court beyond the twenty-five days from January 17, 1944, in accordance with Rule 33 of this Court.

Reasons for Petition for Reconsideration or Rehearing.

The original cause of action in the District Court of the United States for the Northern District of Illinois, Eastern Division was brought by the petitioner, Joseph E. Snowden, a citizen of the United States and the State of Illinois against the respondents, Edward J. Hughes, Louie E. Lewis and Robert E. Straus, *et al.*, etc. The pleadings revealed that the Respondents, Edward J. Hughes, and Louie E. Lewis, and the decedent, Henry Horner, whose co-executors are Respondents, were respectively the duly elected Secretary of State, Treasurer and Governor of the State of Illinois, and were, ex officio, members of the State Primary Canvassing Board of the State of Illinois. The complaint charged that these state officers acting under the color of the laws and by virtue of the power vested in them by the laws of the State of Illinois, had wilfully, maliciously and arbitrarily refused to designate Petitioner, Snowden, as one of the nominees of the Republican party. Petitioner alleged that the wilful, malicious and arbitrary acts of the Respondents were in violation of the Fourteenth Amendment. That the said action of the Respondents was an "unequal" administration of the laws of Illinois: that it was a denial to Petitioner of the equal protection of the laws: and that it deprived Petitioner of his property without due process of law. The Petitioner, by the allegations in his complaint, does not seek to gain or attain a seat in the General Assembly of the State of Illinois. Petitioner seeks only to recover damages from the Respondents for their illegal and unlawful acts whereby they wilfully, maliciously and arbitrarily deprived Respondent of a right that accrued to him as a citizen of the United States. The Constitution of the State of Illinois provides:

> "§6. Residence and Citizenship as qualification for Office. No person shall be elected or appointed to any office in the state, civil or military, who is not a citizen

of the United States, and who has not resided in this State one year next preceding the election or appointment." Art. VII, par. 6, Cont. of Ill. 1870.

It will be seen that it is Petitioner's citizenship of the United States that qualified him to be a candidate for office; being a resident of the State is secondary. Without that provision in the constitution, the requirement as to national citizenship as a qualification to be eligible for election or appointment to office; any person who resided in the state for a period of one year would be qualified to stand for election. We think that the real question presented here is not, whether the Petitioner was or was not lawfully entitled to receive his certificate of nomination; but the real question is, is the Fourteenth Amendment to the Constitution of the United States a virile living thing; is a citizen of the United States just such a citizen or is he in reality just a citizen of some particular state or commonwealth. Are the men in the fox holes of Guadalcanal, the muddy roads of Italy, flying the planes above our fighting forces, citizens of the United States or just citizens of the respective states from which they came. The 48 stars, symbolic of the 48 states, are set in a sea of blue indicative of the oneness of this nation. The members of the armed forces are serving because of their reciprocal obligation as a citizen of the United States and not as a citizen of the several states. *Selective Draft Law Cases*, 245 U. S. 366, 389.

Until the Fourteenth Amendment came there was no power or force in the Nation to coerce the states to grant and observe the rights of the Magna Charta to their people; the states could grant or deny them. The supreme importance of the Fourteenth Amendment thus lies in the fact that it does compel the states to concede those rights, else the national power can be invoked to coerce their concession. The Fourteenth Amendment thus brought about a wonderful change in governmental relations between states and nation, we may say in the governmental fabric

almost; it greatly increased the national power over a large field, and also decreased the sovereign or final power of the states. Chief Justice Fuller speaking for this Court in the case of *In Re Remmler*, 136 U. S. 436 at page 448, said:

> "Protection to life, liberty and property rests primarily with the States; and the Amendment furnishes an additional guaranty against any encroachment by the states upon those fundamental rights which belong to citizenship, and which the state governments were created to secure."

Before the enactment of the Fourteenth Amendment, which brought into being citizenship of the United States, the citizens of the several states were without protection against wilful, malicious and arbitrary action similar to the wilful, malicious and arbitrary acts of the Respondents. The sovereign power of a nation is alone competent to avenge wrongs committed by a sovereign. Thus the Fourteenth Amendment clothed the nation with power to avenge the wrongs committed by the sovereign states against citizens of the United States. There can be no question as to the power of our Federal Courts to hold State statutes invalid or to pass upon the invalidity of their administration or inforcement; for if the restrictions placed upon the States and upon the Nation respectively by the Constitution are to have any binding effect, and if the lines between State and Nation are to be preserved, they must be enforceable by the Court of the Nation otherwise they will not be enforced.

Chief Justice White, speaking for this Court in the *Selective Draft Law* cases, had the following to say as to the citizenship of the United States as created by the Fourteenth Amendment:

> "But to avoid all misapprehension we briefly direct attention to that amendment for the purpose of point-

ing out, as has been frequently done in the past, how completely it broadened the national scope of the government under the Constitution by causing citizenship of the United States to be paramount and dominant instead of being subordinate and derivative, and therefore, operating as it does upon all powers conferred by the Constitution." 245 U. S. 366, 389.

The right that Petitioner seeks to have this Court protect is a right conferred upon him by virtue of his citizenship of the United States; a right that is paramount and dominant and not subordinate and derivative. The Constitution of Illinois makes citizenship of the United States the first qualification for eligibility for election to office in the State of Illinois. The Respondents by their refusal to file a correct certificate with the Secretary of State showing that petitioner was one of the Republican nominees was an infringement upon a right of a citizen of the United States.

"More than forty years ago this Court determined that an unlawful denial by state action of a right to state political office is not a denial of a right of property or of liberty secured by the due process clause, (Taylor & Marshall v. Beckham, 178 U. S. 548). Only once since has this Court had occasion to consider the question and it then re-affirmed that conclusion, (Cave v. Newell, 246 U. S. 650) as we re-affirm it now."

In *Taylor & Marshall v. Beckham* the question before the Court was whether Taylor & Marshall should be granted an order of ouster against Beckham as the Governor of the State of Kentucky, the latter having been seated through an election contest which was adjudged in his favor by both Houses of the Kentucky Legislature, which action was reviewed by the Kentucky State Courts and affirmed and was brought to this Court on Writ of Error; and on considera-

tion by this Court, the Writ of Error was dismissed and the Court, in its opinion in *Taylor & Marshall* v. *Beckham,* 178 U. S. 548 at page 579 says:

> "Whether certain Statutes have or have not binding force, it is for the State to determine, and that determination in itself involves no infraction of the constitution of the United States, and raises no federal question giving the Courts of the United States jurisdiction. These observations are applicable here."

From this principle of law we are of the opinion that we are safe in assuming that the Court dismissed the Writ of Error in *Taylor & Marshall* v. *Beckham* on the ground that no federal question was involved giving the Court jurisdiction.

In *Taylor & Marshall* v. *Beckham* the dissenting opinion of Mr. Justice Brewer:

> "I agree fully with those decisions which are referred to, and which hold that as between the State and the officeholder there is no contract right either to the term of office, or the amount of salary, and that the legislature may, if not restrained by constitutional provisions, abolish the office or reduce the salary. But when the office is not disturbed, when the salary is not changed, and when, under the constitution of the State, neither can be by the legislature, and the question is simply whether one shall be deprived of that office and its salary, and both given to another, a very different question is presented, and in such a case to hold that the incumbent has no property in the office with its accompanying salary does not commend itself to my judgment."

Mr. Justice Brewer was of the opinion that the judgment of the Court of Appeals of Kentucky should have been

affirmed and that the Court should not have dismissed the Writ of Error.

In the case at bar it seems safe to say that this Court has adopted the opinion of Mr. Justice Brewer to the extent that the Order entered in the case at bar was an Order affirming the Order of the Lower Court rather than dismissing the Writ of Error. It would seem that the Court could well have adopted the other tenets to the effect that the right of a Political Office is properly within the meaning of the Federal Constitution.

In the case at bar Snowden, the Petitioner, is not seeking to question the right of himself as against an incumbent to hold a Political Office, but on the other hand is seeking to redress a wrong committed by a Political Officer in denying to him, Snowden, the right to a Political Office. In *Taylor & Marshall* v. *Beckham*, in the dissenting opinion of Mr. Justice Harlan at page 592:

> "There ought not, at this day, to be any doubt as to the objects which were intended to be attained by the requirement of due process of law. 'They were intended,' this court has said, 'to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private right and distributive justice.'" (*Bank* v. *Okely*, 4 Wheat. 244).

When we apply the above announced principle of law to the case now being considered by this Court, we fail to see how the Court could remain deaf to the cry and complaint of the Petitioner, Snowden, against the wilful, malicious and arbitrary act of the respondents, Lewis, Hughes and Horner, plus the further fact that these acts, as set forth in the complaint of the Petitioner, are admitted in the same quality and quantity as alleged, since the only pleading filed by the Respondents was a motion to dismiss

and the effect of this motion was to admit all facts then pleaded. This being true, the Respondents admitted that the Petitioner, Snowden, had been certified by the Canvassing Board of Cook County, of the State of Illinois; and further that the Canvassing Board of the State of Illinois had published the fact that Snowden and one Jenkins had received the highest number of votes cast in the April Primary Election of 1940 and that it was their duty as such board to have correctly designated Snowden and Jenkins as the Republican Nominees for the General Assembly, but that notwithstanding these things they, the Respondents wilfully, maliciously and arbitrarily refused to place the Petitioner, Snowden's name on the Republican Ballot for the General Assembly.

They further admitted, by their pleadings, that while acting as the Board they were acting as an arm of the Sovereign State of Illinois and that their acts were the acts of the State of Illinois. Upon these grounds we respectfully urge upon this Court that in deference to the principles of law announced in *Taylor & Marshall* v. *Beckham,* this Court should and ought to grant to this Petitioner a rehearing and a reconsideration.

"And where the official act purports to be in conformity to the statutory classification, the erroneous or mistaken performance of the statutory duty, although a violation of the statute, is not without more a denial of the equal protection of the laws."

We fail to see how the pleading in the instant case could give rise to the pronouncement by this Court of such a rule of law. The case comes to this Court on the pleadings. This being true, this Court is without right, by the authority of the pleading to reclassify the acts of the Respondents which were termed by the Petitioner in his complaint as wilful, malicious and arbitrary; and the motion to dis-

miss admitted that these acts were wilful, malicious and arbitrary. Then at this stage of the pleading when no evidence, other than the pleading, is before the Court, how could the Court refer to the acts of the Respondents as mistaken acts when there was no evidence that the acts complained of had been innocent acts. In other words upon what basis did the Court assume, in the case at bar, that the acts of the Respondents, Hughes, the Secretary of the State of Illinois, and Horner, the Governor of the State of Illinois, and Lewis, the Treasurer of the State of Illinois, were guilty of a mistake, which mistake was the taking from the Petitioner a right to be the Republican Nominee for the General Assembly for the State of Illinois. In the pleading in the case at bar we take it that when the Court says in its opinion,

> "That the unlawful administration, by a State Officer, of a State Statute, fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination."

that it is the intention of the Court to promulgate a new principle of law. When this rule of law is applied to the facts in the case at bar it seems that whether or not the plaintiff states a good cause, action should be determined by his pleading, and in order to determine this we must resort to the Illinois Civil Practice Act, Ill. Rev. Stat. 1941, Chap. 110, Sec. 166, Sub-sec. 2:

> "No pleading shall be deemed bad in substance which shall contain such information as shall reasonably inform the opposite party of the nature of the claim or defense which it is called upon to meet."

In the case at bar the Respondents made no objection that they were not reasonably informed as to the character

of the complaint nor does it seem that such objection could have been made.

We again refer to the Illinois Civil Practice Act; Section 45, Ill. Rev. Stat., 1941, ch. 110, #169, provides that "(1) All objections to pleadings heretofore raised by demurrer shall be raised by motion. Such motion shall point out specifically the defects complained of, and shall ask for such relief as the nature of the defects may make appropriate * * * where a pleading is substantially insufficient in law, or that a pleading be made more definite and certain in a specified particular. * * *" In the case of *Hitchcock* v. *Reynolds*, 278 Ill. App. 559 at page 562, the Court says:

> "A motion which fails to allege facts pointing out specifically the defects complained of and to ask for such relief as the nature of the defects may make appropriate, is insufficient in law and will not be entertained by the court."

Nowhere in the motions to strike filed by the Respondents do the Respondents set forth any facts which point out specifically "The lack of any allegations in the complaint here, tending to shew a purposeful discrimination between persons or classes of persons is not supplied by the opprobious epithets 'willful' and 'malicious' applied to the Board's failure to certify petitioner as a successful candidate, or by characterizing that failure as an unequal, unjust and oppressive administration of the laws of Illinois."

The Court states further, page 563:

> "The purpose of the Act, in requiring the motion to specifically point out the nature of the defects, is to inform the party against whom the motion is directed what the contention of the party is, so that he may make preparation to meet such contention."

Nowhere in the motions or pleading filed by the Respondents have the said Respondents alleged, set forth or stated facts which would be a basis for the Court's pronouncement. In *Ickes* v. *Fox, et al.*, 300 U. S. 82 at page 96, this Court said:

> "The motion to dismiss concedes the truth of the allegations, but even if they were denied, we should still be obliged to indulge the presumption, in favor of the jurisdiction of the trial court, that respondents might be able to prove them."

It appears that the reasoning of this Court in the case just cited is in line with the present judicial trend; that is, Courts do not now construe pleadings against the pleader but pleadings are now to be construed so as to do substantial justice. In a recent case decided in the Circuit Court of Appeals, Fifth Circuit, Justice Sibley said:

> "Under the Rules of Civil Procedure a case consists not in the pleadings, but the evidence, for which the pladings furnish the basis. Cases are generally to be tried on the proofs rather than the pleadings. Demurrers are abolished. • • • But the principle is no longer of force that pleadings will be construed strictly against the pleader. Rule 8 (f) says that 'all pleadings shall be so construed as to do substantial justic.'" *DeLoach, et al.* v. *Crowley's Inc.*, 128 F. 2nd 378, 380.

Justice Sanborn, speaking with reference to Rule 12 (b) (6) 28 U. S. C. A. following Sec. 723c, in *Leimer* v. *State Mutual, et al.*, said:

> "Under the present practice, we think, the making of a motion to dismiss a complaint for failure to state a claim upon which relief can be granted has the effect of admitting the existence and validity of the claim as stated." 108 F. 2nd, 302, 306.

Mr. Justice Douglas, in his opinion in this case, states that he believes that the complaint is sufficient to raise the issue. That "all pleadings shall be construed as to do substantial justice."

When this Court made the pronouncement that more than forty years ago it had determined that an unlawful denial by state action of a right to state political office is not a denial of a right of property or liberty secured by the due process clause; and that only once since then had it had occasion to consider the question: we are mindful of the fact that the cases so considered were not in any way similar to the facts in the case before the court. In the cases of *Taylor & Marshall* v. *Beckham*, 178 U. S. 548, *Cave* v. *Newell*, 246 U. S. 650; and also *Wilson* v. *North Carolina*, 169 U. S. 586, 696. In those cases the question before the court was the question of investing the parties with the mantle of office. No such question arises in the case before this Court. No where have we been able to find, since *Taylor & Marshall* v. *Beckham* and *Cave* v. *Newell*, a case or cases analogous to the case before the Court. Petitioner does not seek to be installed into office; his action is an action for damages against the Respondents who, by virtue of public position under a State Government and in the name and for the State acted contrary to an express command of the state law. Since *Taylor & Marshall* v. *Beckham* there has been a more liberal trend in the interpretation given by courts to the word "property" as associated with public office. In *Taylor* v. *Beckham*, 178 U. S. 548, 602, Justice Harlan enunciated the new concept of "property" which has been adopted by many jurisdictions. While this Court has not been called upon to consider the question of "property" in connection with public office since that time, many state jurisdictions have had the question presented. "Property" is now said to be the right that a person has in relation to something; it is interpreted as inclusive of whatever right a person

can have, possess and enjoy in relation to something; he who has that right to the exclusion of others, is said to have the property. That an office is the subject of property, as every other thing corporeal or incorporeal, from which man can earn a livelihood and make gain. *Joyner* v. *Browning*, 30 F. Supp. 512, 517; *State* v. *Lollis*, 326 Mo. 644, 649; *Taylor* v. *Nealon*, 120 S. W. 2d, 586, 588; *Carter* v. *Commission*, 14 Cal. 2d, 179, 182, 93 Pac. 2d, 140, 142; *Flood* v. *State*, 100 Fla. 70, 78, 129 So. 861. The Supreme Court of Illinois has also adopted the broad view of the concept of the rights guarded and protected by the due process clause of the Constitution and says "These terms, 'life', 'liberty' and 'property', embrace every personal, political and civil right which any person within the state may possess," *Josma* v. *Western*, 249 Ill. 508, 514; 94 N. E. 945, 946. In *Fletcher* v. *Tuttle*, 151 Ill. 41-53, 37 N. E. 683-686, the Supreme Court of Illinois said:

> "Every citizen has the right of voting for public office and being elected. These are the political rights which the humblest citizen possesses."

And in *Gillespie* v. *People*, 188 Ill. 176, 182 the Court again announced the same principle of law in the following language:

> "The terms 'life', 'liberty' and 'property' are representative terms, and intended to cover every right, to which a member of the body politic is entitled under the law. . . . Indeed they may embrace all our liberties, personal, civil, and political."

The right which Petitioner claims the Respondents violated is the right which every duly qualified citizen has under our representative form of government; that is, the right of equality of opportunity to be chosen a representative of the people in the conduct of the affairs of government. Such right is a fundamental civil right. *Fletcher* v. *Tuttle*, 151 Ill. 41-53; 37 N. E. 683-686. Unless its existence

is recognized and protected a republican form of government is impossible. That if it is left to the whims and caprices of state officers to summarily deny to a citizen of the United States a right that accrues to him as such citizen of the United States, it would be to contravene every conception of national unity. It would also introduce a caste system utterly incompatible with the spirit of our system of government. It would permit those who are in power to stigmatize those whom they viewed with disfavor; it would tend to discourage the ambitions of those who desire to serve their fellow citizens. It might thus withhold from a large segment of our people that mobility which is basic to any guarantee of freedom of opportunity. The result would be a substantial dilution of the rights of national citizenship, a serious impairment of the principles of equality. If no such right exists, then government by the will of the governed cannot function, cloaking their actions under color of state authority, state officers could chose to ignore the will of the electorate. Counsel for the Respondents, on argument before this Court, endeavored to argue the immunity of the respondents to coercion. However, Mr. Justice Harlan, speaking for this Court in *Tindal* v. *Wesley*, 167 U. S. 204, 217 said:

> "No man in this country is so high that he is above the law. All officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it."

In the case before the Court the respondents, by their motion to dismiss conceded that the complaint stated the truth, *Mandley* v. *Backer*, 121 F. 2d, 875, 876, they attempt by their motion to dismiss, which admits the validity and correctness of the allegations in petitioner's complaint, to gain immunity for their defiance of the law.

We believe that the words of Mr. Justice Black in the case of *Smith* v. *Texas*, 311 U. S. 128, 130 are applicable

to the case before this court; in that case Mr. Justice Black said, page 130:

> "The fact that the written words of a State's laws hold out a promise that no such discrimination will be practiced is not enough. The Fourteenth Amendment requires that equal protection to all must be given—not promised."

In that case, as in the case before the Court, the statutory scheme is not in itself unfair, it was capable of being carried out with no discrimination whatsoever as in this case, but by reason of the exercise of discretion, it was equally capable of being applied in such a manner as to proscribe any person or group thought by the law's administrators to be undesirable. So in the case before the Court the directions of the statutes of the state of Illinois were not enough, the mere promise did not give to petitioner the protection required by the Fourteenth Amendment.

CONCLUSION.

In conclusion we are of the opinion that if the interpretation placed upon the pleadings in the complaint prevails it will be almost impossible to draft a complaint which would be good in law. We submit that when a complaint sufficiently informs the opposing party of the nature of the claim that is made against him, that there is no justification for dismissing the complaint for insufficiency of statement, except where it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of the claim. *Leimer* v. *State Mutual, et al.*, 108 F. 2d, 3032-306. In making a decision in this matter Petitioner desires that

the Court clarify the effect of the decision of the Court as to whether or not the petitioner would be permitted to file an amended complaint in the event the Court does not see fit to act favorably upon this petition for reconsideration or rehearing.

For the foregoing reasons the petitioner respectfully urges that a rehearing be granted and that upon further consideration that the order of January 17, 1944, affirming the judgment of the lower court in the above entitled cause be revoked.

Respectfully submitted,

WILLIAM R. MING, JR.,
JOSEPH E. SNOWDEN,
HEBER T. DOTSON,
Counsel for Petitioner.

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I, Joseph E. Snowden, petitioner, and of counsel for petitioner, do hereby certify that the foregoing petition for reconsideration and rehearing and for vacating the order affirming the judgment of the lower court is presented in good faith and not for the purpose of delay.

JOSEPH E. SNOWDEN,
Petitioner and of Counsel for Petitioner.

pp. 12-8-9

SUPREME COURT OF THE UNITED STATES.

No. 57.—October Term, 1943.

Joseph E. Snowden, Petitioner, *vs.* Edward J. Hughes, Louie E. Lewis and Robert E. Straus, et al., etc.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[January 17, 1944.]

Mr. Chief Justice Stone delivered the opinion of the Court.

Petitioner, a citizen of Illinois, brought this suit at law in the District Court for Northern Illinois against respondents, citizens of Illinois, to recover damages for infringement of his civil rights in violation of the Fourteenth Amendment and 8 U. S. C. §§ 41, 43, and 47(3). He alleged that the suit was within the jurisdiction of the court as a suit arising under the Constitution and laws of the United States, 28 U. S. C. § 41(1), a suit for the recovery of damages for injury to property and for deprivation of a right or privilege of a citizen of the United States, 28 U. S. C. § 41(12), and a suit for the recovery of damages for deprivation, under color of state law, custom, regulation or usage, of a right or privilege secured by the Fourteenth Amendment, 28 U. S. C. § 41(14).

The complaint makes the following allegations. Petitioner was one of several candidates at the April 9, 1940, Republican primary election held in the Third Senatorial District of Illinois pursuant to Ill. Rev. Stat. (State Bar Ass'n Ed.), Ch. 46, Art. 8 for nominees for the office of representative in the Illinois General Assembly. By reason of appropriate action taken respectively by the Republican and Democratic Senatorial Committees of the Third Senatorial District in conformity to the scheme of proportional representation authorized by Ill. Rev. Stat., Ch. 46, § 8-13, two candidates for representative in the General Assembly were to be nominated on the Republican ticket and one on the Democratic ticket. Since three representatives were to be elected, Ill. Const., Art. IV, §§ 7 and 8, and only three were to be nominated by the primary election, election at the primary as one of the two Re-

publican nominees was, so the complaint alleges, tantamount to election to the office of representative.

The votes cast at the primary election were duly canvassed by the Canvassing Board of Cook County, which, as required by Ill. Rev. Stat., Ch. 46, § 8-15, certified and forwarded to the Secretary of State a tabulation showing the results of the primary election in the Third Senatorial District. By this tabulation the Board certified that petitioner and another had received respectively the second highest and highest number of votes for the Republican nominations. Ill. Rev. Stat., Ch. 46, § 8-13 requires that the candidates receiving the highest votes shall be declared nominated.

Respondents Hughes and Lewis, and Henry Horner whose executors were joined as defendants and are respondents here, constituted the State Primary Canvassing Board for the election year 1940. By Ill. Rev. Stat., Ch. 46, § 8-15 it was made their duty to receive the certified tabulated statements of votes cast, including that prepared by the Canvassing Board of Cook County, to canvass the returns, to proclaim the results and to issue certificates of nomination to the successful candidates. Such a certificate is a prerequisite to the inclusion of a candidate's name on the ballot. Ill. Rev. Stat., Ch. 46, § 10-14. Acting in their official capacity as State Primary Canvassing Board they issued, on April 29, 1940, their official proclamation which designated only one nominee for the office of representative in the General Assembly from the Third Senatorial District on the Republican ticket and excluded from the nomination petitioner, who had received the second highest number of votes for the Republican nomination.

After setting out these facts the complaint alleges that Horner and respondents Hughes and Lewis, "willfully, maliciously and arbitrarily" failed and refused to file with the Secretary of State a correct certificate showing that petitioner was one of the Republican nominees, that they conspired and confederated together for that purpose, and that their action constituted "an unequal, unjust and oppressive administration" of the laws of Illinois. It alleges that Horner, Hughes and Lewis, acting as state officials under color of the laws of Illinois, thereby deprived petitioner of the Republican nomination for representative in the General Assembly and of election to that office, to his damage in the amount of $50,000, and by so doing deprived petitioner, in contravention of 8 U. S. C. §§ 41, 43 and 47(3), of rights, privileges

and immunities secured to him as a citizen of the United States, and of the equal protection of the laws, both guaranteed to him by the Fourteenth Amendment.

The District Court granted motions by respondents to strike the complaint and dismiss the suit upon the grounds, among others, that the facts alleged did not show that the plaintiff had been deprived of any right, privilege or immunity secured to him by the Constitution or laws of the United States, and that, the alleged cause of action being predicated solely upon a claim that state officers had failed to perform duties imposed upon them by state law, their failure was not state action to which the prohibitions of the Fourteenth Amendment are alone directed, and hence was not sufficient to establish an infringement of rights secured to petitioner by the Fourteenth Amendment. The Court of Appeals for the Seventh Circuit affirmed, 132 F. 2d 476, holding on authority of *Barney* v. *City of New York*, 193 U. S. 430, that the action of the members of the State Board, being contrary to state law, was not state action and was therefore not within the prohibitions of the Fourteenth Amendment.

In substance petitioner's alleged cause of action is that the members of the State Primary Canvassing Board, acting as such but in violation of state law, have by their false certificate or proclamation and by their refusal to file a true certificate deprived petitioner of nomination and election as representative in the state assembly. To establish a cause of action arising under the Constitution and laws of the United States within the jurisdiction of the District Court as prescribed by 28 U. S. C. § 41(1), (12) and (14), he relies particularly on the provisions of the Fourteenth Amendment supplemented by two sections of the Civil Rights Act of 1871, 8 U. S. C. §§ 43, 47(3).[1]

Section 43 provides that "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable

[1] 8 U. S. C. § 41, on which petitioner also relies, guaranties to all persons within the United States "the same right . . . to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens". As pointed out later in this opinion, no claim of discrimination based on race is made.

to the party injured in an action at law . . . for redress." Section 47(3), so far as now relevant, gives an action for damages to any person "injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States", by reason of a conspiracy of two or more persons entered into "for the purpose of depriving . . . any person . . . of the equal protection of the laws, or of equal privileges and immunities under the laws". It is the contention of petitioner that the right conferred on him by state law to become a candidate for and to be elected to the office of representative upon receipt of the requisite number of votes in the primary and general elections, is a right secured to him by the Fourteenth Amendment, and that the action of the State Primary Canvassing Board deprived him of that right and of the equal protection of the laws for which deprivation the Civil Rights Act authorizes his suit for damages.

Three distinct provisions of the Fourteenth Amendment guarantee rights of persons and property. It declares that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

The protection extended to citizens of the United States by the privileges and immunities clause includes those rights and privileges which, under the laws and Constitution of the United States, are incident to citizenship of the United States, but does not include rights pertaining to state citizenship and derived solely from the relationship of the citizen and his state established by state law. *Slaughter-House Cases*, 16 Wall. 36, 74, 79; *Maxwell* v. *Bugbee*, 250 U. S. 525, 538; *Prudential Insurance Co.* v. *Cheek*, 259 U. S. 530, 539; *Madden* v. *Kentucky*, 309 U. S. 83, 90-93. The right to become a candidate for state office, like the right to vote for the election of state officers, *Minor* v. *Happersett*, 21 Wall. 162, 170-78; *Pope* v. *Williams*, 193 U. S. 621, 632; *Breedlove* v. *Suttles*, 302 U. S. 277, 283, is a right or privilege of state citizenship, not of national citizenship which alone is protected by the privileges and immunities clause.

More than forty years ago this Court determined that an unlawful denial by state action of a right to state political office is not a denial of a right of property or of liberty secured by the due

process clause. *Taylor & Marshall* v. *Beckham*, 178 U. S. 548. Only once since has this Court had occasion to consider the question and it then reaffirmed that conclusion, *Cave* v. *Newell*, 246 U. S. 650, as we reaffirm it now.

Nor can we conclude that the action of the State Primary Canvassing Board, even though it be regarded as state action within the prohibitions of the Fourteenth Amendment, was a denial of the equal protection of the laws. The denial alleged is of the right of petitioner to be a candidate for and to be elected to public office upon receiving a sufficient number of votes. The right is one secured to him by state statute and the deprivation of right is alleged to result solely from the Board's failure to obey state law. There is no contention that the statutes of the state are in any respect inconsistent with the guarantees of the Fourteenth Amendment. There is no allegation of any facts tending to show that in refusing to certify petitioner as a nominee, the Board was making any intentional or purposeful discrimination between persons or classes. On the argument before us petitioner disclaimed any contention that class or racial discrimination is involved. The insistence is rather that the Board, merely by failing to certify petitioner as a duly elected nominee, has denied to him a right conferred by state law and has thereby denied to him the equal protection of the laws secured by the Fourteenth Amendment.

But not every denial of a right conferred by state law involves a denial of the equal protection of the laws, even though the denial of the right to one person may operate to confer it on another. Where, as here, a statute requires official action discriminating between a successful and an unsuccessful candidate, the required action is not a denial of equal protection since the distinction between the successful and the unsuccessful candidate is based on a permissible classification. And where the official action purports to be in conformity to the statutory classification, an erroneous or mistaken performance of the statutory duty, although a violation of the statute, is not without more a denial of the equal protection of the laws.

The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination. This may appear on the face of the

action taken with respect to a particular class or person, cf. *McFarland* v. *American Sugar Co.*, 241 U. S. 79, 86-7, or it may only be shown by extrinsic evidence showing a discriminatory design to favor one individual or class over another not to be inferred from the action itself, *Yick Wo* v. *Hopkins*, 118 U. S. 356, 373-4. But a discriminatory purpose is not presumed, *Tarrance* v. *Florida*, 188 U. S. 519, 520; there must be a showing of "clear and intional discrimination", *Gundling* v. *Chicago*, 177 U. S. 183, 186; see *Ah Sin* v. *Wittman*, 198 U. S. 500, 507-8; *Bailey* v. *Alabama*, 219 U. S. 219, 231. Thus the denial of equal protection by the exclusion of negroes from a jury may be shown by extrinsic evidence of a purposeful discriminatory administration of a statute fair on its face. *Neal* v. *Delaware*, 103 U. S. 370, 394, 397; *Norris* v. *Alabama*, 294 U. S. 587, 589; *Pierre* v. *Louisiana*, 306 U. S. 354, 357; *Smith* v. *Texas*, 311 U. S. 128, 130-31; *Hill* v. *Texas*, 316 U. S. 400, 404. But a mere showing that negroes were not included in a particular jury is not enough; there must be a showing of actual discrimination because of race. *Virginia* v. *Rives*, 100 U. S. 313, 322-3; *Martin* v. *Texas*, 200 U. S. 316, 320-21; *Thomas* v. *Texas*, 212 U. S. 278, 282; cf. *Williams* v. *Mississippi*, 170 U. S. 213, 225.

Another familiar example is the failure of state taxing officials to assess property for taxation on a uniform standard of valuation as required by the assessment laws. It is not enough to establish a denial of equal protection that some are assessed at a higher valuation than others. The difference must be due to a purposeful discrimination, which may be evidenced, for example, by a systematic under-valuation of the property of some taxpayers and a systematic over-valuation of the property of others, so that the practical effect of the official breach of law is the same as though the discrimination were incorporated in and proclaimed by the statute. *Coulter* v. *Louisville & N. R. Co.*, 196 U. S. 599, 607, 609-10; *Chicago B. & Q. Ry.* v. *Babcock*, 204 U. S. 585, 597; *Sunday Lake Iron Co.* v. *Wakefield*, 247 U. S. 350, 353; *Southern Ry. Co.* v. *Watts*, 260 U. S. 519, 526.[2] Such discrimination may also be shown to be purposeful, and hence a denial of equal protection, even though it is neither systematic nor long-continued. Cf. *McFarland* v. *American Sugar Co., supra.*

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[2] See also Raymond v. Chicago Union Traction Co., 207 U. S. 20, 36; Sioux City Bridge Co. v. Dakota Co., 260 U. S. 441, 447; Bohler v. Calloway, 267 U. S. 479, 489; Cumberland Coal Co. v. Board of Revision, 284 U. S. 23, 25, 28; cf. Great Northern Ry. v. Weeks, 297 U. S. 135, 139.

The lack of any allegations in the complaint here, tending to show a purposeful discrimination between persons or classes of persons is not supplied by the opprobrious epithets "willful" and "malicious" applied to the Board's failure to certify petitioner as a successful candidate, or by characterizing that failure as an unequal, unjust, and oppressive administration of the laws of Illinois. These epithets disclose nothing as to the purpose or consequence of the failure to certify, other than that petitioner has been deprived of the nomination and election, and therefore add nothing to the bare fact of an intentional deprivation of petitioner's right to be certified to a nomination to which no other has been certified. Cf. *United States* v. *Illinois Central Co.*, 303 U. S. 239, 243. So far as appears the Board's failure to certify petitioner was unaffected by and unrelated to the certification of any other nominee. Such allegations are insufficient under our decisions to raise any issue of equal protection of the laws or to call upon a federal court to try questions of state law in order to discover a purposeful discrimination in the administration of the laws of Illinois which is not alleged. Indeed on the allegations of the complaint, the one Republican nominee certified by the Board was entitled to be certified as the nominee receiving the highest number of votes, and the Board's failure to certify petitioner, so far as appears, was unaffected by and unrelated to the certification of the other, successful nominee. While the failure to certify petitioner for one nomination and the certification of another for a different nomination may have involved a violation of state law, we fail to see in this a denial of the equal protection of the laws more than if the Illinois statutes themselves had provided that one candidate should be certified and no other.

If the action of the Board is official action it is subject to constitutional infirmity to the same but no greater extent than if the action were taken by the state legislature. Its illegality under the state statute can neither add to nor subtract from its constitutional validity. Mere violation of a state statute does not infringe the federal Constitution. Compare *Water Works Co.* v. *Owensboro*, 200 U. S. 38, 47. And state action, even though illegal under state law, can be no more and no less constitutional under the Fourteenth Amendment than if it were sanctioned by the state legislature. *Nashville, C. & St. L. Ry.* v. *Browning*, 310 U. S. 362, 369-70. See also *Coulter* v. *Louisville & N. R. R. Co.*, *supra*,

608-9; *Hayman* v. *Galveston*, 273 U. S. 414, 416; *Iowa-Des Moines Bank* v. *Bennett*, 284 U. S. 239, 244. A state statute which provided that one nominee rather than two should be certified in a particular election district would not be unconstitutional on its face and would be open to attack only if it were shown, as it is not here, that the exclusion of one and the election of another were invidious and purposely discriminatory. Compare *Missouri* v. *Lewis*, 101 U. S. 22, 30, 32; *Yick Wo* v. *Hopkins*, *supra*.

Where discrimination is sufficiently shown, the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights. *McPherson* v. *Blacker*, 146 U. S. 1, 23-4; *Nixon* v. *Herndon*, 273 U. S. 536, 538; *Nixon* v. *Condon*, 286 U. S. 73; see *Pope* v. *Williams*, *supra*, 634. But the necessity of a showing of purposeful discrimination is no less in a case involving political rights than in any other. It was not intended by the Fourteenth Amendment and the Civil Rights Acts that all matters formerly within the exclusive cognizance of the states should become matters of national concern.

A construction of the equal protection clause which would find a violation of federal right in every departure by state officers from state law is not to be favored. And it is not without significance that we are not cited to and have been unable to find a single instance in which this Court has entertained the notion that an unlawful denial by state authority of the right to state office is without more a denial of any right secured by the Fourteenth Amendment. See *Taylor & Marshall* v. *Beckham*, *supra*, and authorities cited; *Cave* v. *Newell*, *supra*. Only once has it been contended here that an unlawful denial by state executive, administrative or legislative authority of the right to state office is for that reason alone a denial of equal protection. *Wilson* v. *North Carolina*, 169 U. S. 586.[3] In rejecting that contention this Court said at pages 594-5:

[3] In United States v. Classic, 313 U. S. 299, this Court refused to pass on a similar contention as to a refusal to count ballots cast in an election for federal officers. The holding in that case that a refusal to count votes cast, and the consequent false certification of candidates, was a denial of a right or privilege "secured . . . by the Constitution . . . of the United States" was rested on the ground that the right to vote for a federal officer, whether or not it be deemed a privilege of citizens of the United States, see Twining v. New Jersey, 211 U. S. 78, 97, is a right secured by Art. 1, §§ 2 and 4 of the Constitution. See 313 U. S. at 314-5 and cases cited; United States v. Mosley, 238 U. S. 383. The Court pointed out that "the indictment ~~does not~~ on its face purport to charge a ~~denial~~ of equal protection to voters or candidates," 313 U. S. at 329, and declined to consider whether the facts alleged could constitute such a denial.

does not

deprivation

"In its internal administration the State (so far as concerns the Federal Government) has entire freedom of choice as to the creation of an office for purely state purposes, and of the terms upon which it shall be held by the person filling the office. . . .

Upon the case made by the plaintiff in error, the Federal question which he attempts to raise is so unfounded in substance that we are justified in saying that it does not really exist; that there is no fair color for claiming that his rights under the Federal Constitution have been violated, either by depriving him of his property without due process of law or by denying him the equal protection of the laws."

As we conclude that the right asserted by petitioner is not one secured by the Fourteenth Amendment and affords no basis for a suit brought under the sections of the Civil Rights Acts relied upon, we find it unnecessary to consider whether the action by the State Board of which petitioner complains is state action within the meaning of the Fourteenth Amendment. The authority of *Barney* v. *City of New York*, *supra*, on which the court below relied, has been so restricted by our later decisions, see *Raymond* v. *Chicago Traction Co.*, 207 U. S. 20, 37, *Home Tel. & Tel. Co.* v. *Los Angeles*, 227 U. S. 278, 294; *Iowa-Des Moines Bank* v. *Bennett*, *supra*, 246-7; cf. *United States* v. *Classic*, 313 U. S. 299, 326, that our determination may be more properly and more certainly rested on petitioner's failure to assert a right of a nature such as the Fourteenth Amendment protects against state action.

The judgment is accordingly affirmed for failure of the complaint to state a cause of action within the jurisdiction of the District Court.

Affirmed.

Mr. Justice RUTLEDGE concurs in the result.

Mr. Justice FRANKFURTER, concurring.

The plaintiff brought this action in a district court to recover damages claimed to have been suffered at the hands of the defendants as members of the State Primary Canvassing Board of Illinois. The theory of ~~their~~ his claim is that the defendants, being in legal effect the State of Illinois, denied to the plaintiff the equal protection of its laws.

The crucial allegations charging such a denial are in the following paragraph of the complaint:

> "11. That notwithstanding the clear and plain mandates of section 454 and section 456, chapter 46, Illinois Revised Statutes, the defendants Edward J. Hughes and Louie E. Lewis, and the decedent Henry Horner, acting as the State Primary Canvassing Board of Illinois, entered into an understanding and agreement and combined, conspired and confederated together to willfully, maliciously and arbitrarily refuse to designate plaintiff as one of the nominees of the Republican Party for the office of Representative in the General Assembly from the Third Senatorial District of Illinois and to issue their Official Proclamation designating plaintiff as one of the said nominees and to file their proper and correct certificate in the office of the Secretary of State of Illinois showing that plaintiff was one of the nominees of the Republican Party for the Office of Representative in the General Assembly from the Third Senatorial District of Illinois."

I should be silent were the Court merely to hold that as a matter of pleading these allegations are not sufficiently explicit to charge as an arbitrary act of discrimination the concerted and purposeful use by the defendants of their official authority over the election machinery of the State so as to withhold from the plaintiff the opportunity to present himself to the voters of that State "as one of the nominees of the Republican Party" for election to the General Assembly of Illinois. I should be silent even though it were avowed that such a constrained reading of the complaint reflected the most exacting attitude against drawing into the federal courts controversies over state elections. Unless I mistake the tenor of the Court's opinion, the decision is broader than mere inadequacy of pleading.

All questions pertaining to the political arrangements of state governments are, no doubt, peculiarly outside the domain of federal authority. The disposition of state offices, the manner in which they should be filled and contests concerning them, are solely for state determination, always provided that the equality of treatment required by the Civil War Amendments is respected. And so I appreciate that there are strong considerations of policy which should make federal courts inhospitable toward litigation involving the enforcement of state election laws. But I do not think that the criteria for establishing a denial of the equal protection of the laws are any different in cases of discrimination in granting

opportunities for presenting oneself as a candidate for office "as one of the nominees of the Republican Party" than those that are relevant when claim is made that a state has discriminated in regulating the pursuit of a private calling. It appears extremely unlikely that the plaintiff could establish his case. The sole question now is whether, assuming he can make good his allegations, he should be denied the opportunity of a trial to do so.

The Constitution does not assure uniformity of decisions or immunity from merely erroneous action, whether by the courts or the executive agencies of a state. See *McGovern* v. *New York*, 229 U. S. 363, 370-1. However, in forbidding a state to "deny to any person within its jurisdiction the equal protection of the laws", the Fourteenth Amendment does not permit a state to deny the equal protection of its laws because such denial is not wholesale. The talk in some of the cases about systematic discrimination is only a way of indicating that in order to give rise to a constitutional grievance a departure from a norm must be rooted in design and not derive merely from error or fallible judgment. Speaking of a situation in which conscious discrimination by a state touches "the plaintiff alone", this Court tersely expressed the governing principle by observing that "we suppose that no one would contend that the plaintiff was given the equal protection of the laws." *McFarland* v. *American Sugar Co.*, 241 U. S. 79, 86, 87. And if the highest court of a state should candidly deny to one litigant a rule of law which it concededly would apply to all other litigants in similar situations, could it escape condemnation as an unjust discrimination and therefore a denial of the equal protection of the laws? See *Backus* v. *Fort Street Union Depot Co.*, 169 U. S. 557, 571.

But to constitute such unjust discrimination the action must be that of the state. Since the state, for present purposes, can only act through functionaries, the question naturally arises what functionaries, acting under what circumstances, are to be deemed the state for purposes of bringing suit in the federal courts on the basis of illegal state action. The problem is beset with inherent difficulties and not unnaturally has had a fluctuating history in the decisions of the Court. Compare *Barney* v. *City of New York*, 193 U. S. 430, with *Raymond* v. *Chicago Traction Co.*, 207 U. S. 20, *Memphis* v. *Cumberland Telephone Co.*, 218 U. S. 624, with *Home Tel. &*

Tel. Co. v. *Los Angeles*, 227 U. S. 278. It is not to be resolved by abstract considerations such as the fact that every official who purports to wield power conferred by a state is *pro tanto* the state. Otherwise every illegal discrimination by a policeman on the beat would be state action for purpose of suit in a federal court.

Our question is not whether a remedy is available for such an illegality, but whether it is available in the first instance in a federal court. Such a problem of federal judicial control must be placed in the historic context of the relationship of the federal courts to the states, with due regard for the natural sensitiveness of the states and for the appropriate responsibility of state courts to correct the action of lower state courts and state officials. Take the present case. The plaintiff complains that he has been denied the equal protection of the laws of Illinois precisely because the defendants, constituting the State Canvassing Board, have willfully, with set purpose to withdraw from him the privileges afforded by Illinois, disobeyed those laws. To adapt the language of an earlier opinion, I am unable to grasp the principle on which the State can here be said to deny the plaintiff the equal protection of the laws of the State when the foundation of his claim is that the Board had disobeyed the authentic command of the State. Holmes, J. dissenting, in *Raymond* v. *Chicago Traction Co.*, *supra* at p. 41.

I am clear, therefore, that the action of the Canvassing Board taken, as the plaintiff himself acknowledges, in defiance of the duty of that Board under Illinois law, cannot be deemed the action of the State, certainly not until the highest court of the State confirms such action and thereby makes it the law of the State. I agree, in a word, with the court below that *Barney* v. *City of New York*, 193 U. S. 430, is controlling. Neither the wisdom of its reasoning nor its holding has been impaired by subsequent decisions. A different problem is presented when a case comes here on review from a decision of a state court as the ultimate voice of state law. See for instance *Iowa-Des Moines Bank* v. *Bennett*, 284 U. S. 239. And the case is wholly unlike *Lane* v. *Wilson*, 307 U. S. 268, in which the election officials acted not in defiance of a statute of a state but under its authority.

See, e.g., Ex parte Royall, 117 U.S. 241, 251.

See Isseks, Jurisdiction of the Lower Federal Courts to Enjoin Unauthorized Action of State Officials, 40 Harv. L. Rev. 969.

Mr. Justice DOUGLAS, with whom Mr. Justice MURPHY concurs, dissenting.

My disagreement with the majority of the Court is on a narrow ground. I agree that the equal protection clause of the Fourteenth Amendment should not be distorted to make the federal courts the supervisor of the state elections. That would place the federal judiciary in a position "to supervise and review the political administration of a state government by its own officials and through its own courts" (*Wilson* v. *North Carolina*, 169 U. S. 586, 596)—matters on which each State has the final say. I also agree that a candidate for public office is not denied the equal protection of the law in the constitutional sense merely because he is the victim of unlawful administration of a state election law. I believe, as the opinion of the Court indicates, that a denial of equal protection of the laws requires an invidious, purposeful discrimination. But I depart from the majority when it denies Snowden the opportunity of showing that he was in fact the victim of such discriminatory action. His complaint seems to me to be adequate to raise the issue. He charges a conspiracy to wilfully, maliciously and arbitrarily refuse to designate him as one of the nominees of the Republican party, that such action was an "unequal" administration of the Illinois law and a denial to him of the equal protection of the laws, and that the conspiracy had that purpose. While the complaint could have drawn the issue more sharply, I think it defines it sufficiently to survive the motion to dismiss.

No doubt unconstitutional discriminations against a class, such as those which we have recently condemned in *Lane* v. *Wilson*, 307 U. S. 268, and *Skinner* v. *Oklahoma*, 316 U. S. 535, may be more readily established than a discrimination against an individual *per se*. But though the proof is exacting, the latter may be shown as in *Cochran* v. *Kansas*, 316 U. S. 255, where a prisoner was prevented from perfecting an appeal. The criteria are the same whether one has been denied the opportunity to be a candidate for public office, to enter private business, or to have the protection of the courts. If the law is "applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances" (*Yick Wo* v. *Hopkins*, 118 U. S. 356, 373-374), it is the same as if the invidious discrimination were

incorporated in the law itself. If the action of the Illinois Board in effect were the same as an Illinois law that Snowden could not run for office, it would run afoul of the equal protection clause whether that discrimination were based on the fact that Snowden was a Negro, Catholic, Presbyterian, Free Mason, or had some other characteristic or belief which the authorities did not like. Snowden should be allowed the opportunity to make that showing no matter how thin his chances of success may seem.